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Vol. II

TRANSCRIPT OF RECORD

(Pages 381 to 714)

Supreme Court of the United States

OCTOBER TERM, 1946

No. 731

ROY BARTELS, ED BARTELS, CARL BARTELS AND JUSTIN CONLON, D.B.A. CRYSTAL BALLROOM, PETITIONERS,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA, GRIFF WILLIAMS, ET AL.

No. 732

LARRY V. GEER AND MARGARET GEER, D.B.A. LARRY GEER BALLROOMS, PETITIONERS,

vs.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 29, 1946.

CERTIORARI GRANTED JANUARY 6, 1947.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 13,124.

CIVIL.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,

APPELLANT,

vs.

ROY BARTELS, ED BARTELS, CARL BARTELS, AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED JULY 7, 1945.

No. 13,125.

CIVIL.

E. H. BIRMINGHAM, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE STATE OF IOWA,

APPELLANT,

vs.

LARRY V. GEER AND MARGARET GEER, d/b/a LARRY GEER BALLROOMS,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED JULY 7, 1945.

No. 13,127.

CIVIL.

GRIFF WILLIAMS, BILL CARLSEN, TINY HILL, BOYD RAEBURN, BUDDY FISHER AND PAUL MOORHEAD, INTERVENERS,

APPELLANTS,

vs.

ROY BARTELS, ED BARTELS, CARL BARTELS, AND JUSTIN CONLON, d/b/a CRYSTAL BALLROOM,

APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED JULY 10, 1945.

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By Mr. Wilson:

Q638. —and other information appearing on the back?

A638. Yes.

Q639. And on all the other engagements?

A639. Yes, as far as I know.

Q640. Now, when you played any engagements at ballrooms, did you have any special rehearsals? A640. No—

Q641. You would have no special rehearsals?

A641. No, not unless the ballroom had some special—I don't know that the ballroom ever did—but on any first-nighters I had to have special rehearsals for the special bills that the management appeared in; that has happened.

Q642. The management has asked you to have that special rehearsal? A642. Yes.

Q643. Have the men been paid for that special rehearsal?

[fol. 521] A643. I don't remember.

Q644. You don't remember whether they had to be included in that?

A644. It might be possibly included in the union scale already.

Q645. Now, on these engagements at ballrooms, you would be told when to take intermissions?

Mr. Roberts: Objected to as irrelevant and immaterial, not bearing upon any issue in this case.

Mr. Wilson: You can run that line along.

Mr. Roberts: Yes. As to any other question as to any ballroom other than the Crystal Ballroom.

By the Witsness:

A645. Yes.

By Mr. Wilson:

Q646. And they would tell the men where to go during the intermissions? A646. In the ballrooms —

Q647. When I say "where to go"—

A647. Not usually.

Q648. Location in the ballrooms.

A648. Not usually, no.

Q649. In ballrooms did they, more or less, encourage [fol. 522] the men to mingle with their patrons during the intermissions?

A649. They didn't make it a point; but they made it a point not to.

Q650. In hotels they made it a point not to?

A650. Yes.

Q651. The operation was a bit different?

A651. Quite different.

Q652. In the means of control, that is actually exercised by the signator to the Form B contract?

A652. Yes.

Q653. In other words, the hotels exercise a greater amount of control, and the ballrooms do not think so much of that side? A653. Right.

Q654. And did these ballrooms tell your just what hours you were to play?

Mr. Roberts: Objected to as not the best evidence.

By the Witness:

A654. It is their contract.

By Mr. Wilson:

Q655. It is all arranged?

A655. It is stated; it is stated on the contract.

Q656. Now, the Music Corporation of America is your [fol. 523] agent, you say? A656. Yes.

Q657. For booking your engagements? A657. Yes.

Q658. I cannot make out this signature on this exhibit. Who is this (indicating)? A658. Jim Breyley.

Q659. Who is he?

A659. He is one of the heads of the Music Corporation of America.

Q660. He signed this contract? A660. Yes.

Q661. Now, at the engagement of September 1st, 1941, played at the Crystal Ballroom, did you refuse at any time during that engagement to comply with any request made by the manager of the Crystal Ballroom concerning the detailed manner of rendering music at the Ballroom?

Mr. Roberts: Objected to as assuming conditions not in evidence. May the objection precede his answer?

Mr. Wilson: Yes.

By the Witness:
A661. No.

By Mr. Wilson:
[fol. 524] Q662. During the engagement of September 1st, 1941, had the manager of the Crystal Ballroom requested the discharge of a particular member of the orchestra, would you have felt yourself legally obligated to have discharged that member of the orchestra?
A662. Yes.

Mr. Roberts: I object as calling for a conclusion of the witness, and a self-serving declaration.

By Mr. Wilson:
Q663. The answer was— A663. Yes.
Q664. Are there such things as featured members in an orchestra? A664. Yes, featured.
Q665. You call them featured members? A665. Yes.
Q666. Just who would you say were the featured members of your orchestra?
A666. The vocalists, Bob Kirk, Walter King, Jules Herman; the saxophone man named Joe Porretta. I may include one more.
Q667. Who would that be?
A667. The trombone man, Ernie Gibbs.
[fol. 525] Q668. They were more or less featured men?
A668. They were featured key men.
Q669. Will you define what a name band is?
A669. It is pretty hard—it is pretty hard to make any definition stick. I suppose it is a band that has qualified itself to work a long engagement at a well known establishment.
Q670. Are there nationally known name bands and local name bands? A670. Yes, yes.
Q671. And then there are some bands who are much better known than other bands, is that right? A671. Yes.
Q672. Some are known in certain sections and not in others?
A672. That is right.
Q673. It is all a matter of degree?
A673. It is a matter of degree.
Q674. And geography, both? A674. Yes.

Q675. Did I ask you on the cross-examination whether you had been told on occasions to cut down the volume of your band? A675. Yes.

Q676. And you have done it?

[fol. 526] A676. Yes, I have done it.

Q677. On this engagement played at Crystal Ballroom on September 1, 1941, did you consider yourself legally obligated to comply with any request made by the management of the establishment concerning the manner and the detailed way in which you should render the music?

Mr. Roberts: Objected to as a self-serving declaration, and irrelevant and immaterial.

By The Witness:

A677. Yes.

By Mr. Wilson:

Q678. Who are the Williams Warblers?

A678. I answered that.

Q679. Would you consider them featured men in your orchestra?

A679. Yes.

Q680. Did you name them?

A680. Yes, I did. Did I name them?

Q681. Yes.

A681. No, I don't think I did say.

Mr. Roberts: You had some funny names in it.

The Witness: I said there was only one man in that group.

[fol. 527] By Mr. Wilson:

Q682. Well, would you name them?

A682. Yes. Jules Herman, Bob Lispsky, Bruce Yantis and Charley Gaylord. Leave out Bob Lispsky. He was a member of them for a while. Put in Rounie Conrad.

Q683. Now, would you consider Yantis, Gaylord and Conrad featured members of the orchestra, in addition to the ones named before?

A683. Yes.

Q684. You testified on direct examination that you would inform a new man when he was to appear and when he was to commence playing.

A684. Yes.

Q685. You would tell him to what establishment he was to go?

A685. They generally knew.

Q686. He generally knew?

A686. Sure. I would give him the date and say, "We will start on a Monday night."

Q687. In other words, you say, "We will start on a Monday night" at such and such a place, naming the establishment?

A687. Yes.

Q688. Now, did you generally tell all the members of [fol. 528] the orchestra where the next engagement was and what time they were to be there, to start playing?

A688. Yes.

Q689. And that would be true for all of them?

A689. Yes, sure.

Q690. Not particularly a new man. Has the orchestra ever been requested by the establishment to wear a particular type of uniform?

A690. Yes.

Q691. Did they comply with that request?

A691. Yes.

Q692. You do not recall whether you were asked to wear a particular type of uniform for an engagement—

A692. No.

Q693. —at the Crystal Ballroom the 1st of September, 1941? Probably not?

A693. Probably not.

Q694. You played these one-night engagements before?

A694. Yes.

Q695. And they are just sort of an accepted dress?

A695. Yes; unless they specify differently. I have had to play an engagement where all the band has had to play in baby clothes; that has happened.

[fol. 529] Q697. That has happened?

A697. Yes.

Q697. And then you dressed in baby clothes when requested?

A697. Yes.

Q698. Exhibit B provides a $350 guarantee. Is that $350 sufficient to pay for the transportation, union scale for yourself and all members of the orchestra?

A698. Yes.

Q699. Do you recall whether you told the manager of the Crystal Ballroom how much of that $350 was for transportation?

A699. I don't remember.

Q700. Did you generally tell the manager of the establishments how much was for transportation?

A700. Sometimes; not always; whenever they asked.

Q701. Now, when an engagement is played, is the amount provided for on the contract paid over to you?

A701. That that has not been deposited, yes.

Q702. That which has not been deposited?

A702. Yes.

Q703. With MCA?

A703. Yes.

Q704. Then do you distribute it to the members of the [fol. 530] orchestra?

Mr. Roberts: Objected to as calling for a conclusion of the witness, and very leading.

By The Witness:

A704. Yes.

By Mr. Wilson:

Q705. In executing Form B contracts, for engagements to be played pursuant to Form B contract, was it your intention to give full control over to the services to the establishment?

Mr. Roberts: Objected to as calling for a self-serving declaration.

By The Witness:

A705. If they wanted it.

By Mr. Wilson:

Q706. Was it your intention to give them the right of control?

A706. Yes.

Q707. And you consider, under this particular contract in the record, Exhibit B—

A707. Yes.

Q708. —as having, through your agent, Music Corporation of America, given the same control, the same right to control?

Mr. Roberts: The same objections.

[fol. 531] By The Witness:

A708. Yes.

Cross-Examination.

By Mr. Cohen:

Q709. Mr. Williams, I call your attention to Plaintiffs' Exhibit B, and I ask you whether at the time you executed this you were a member of the American Federation of Musicians?

A709. I was.

Q710. All the men who played with Griff Williams and His Orchestra were also members of the American Federation of Musicians?

A710. They were.

Q711. I believe you stated on direct examination that the union prescribed this form of contract, is that correct?

A711. Yes.

Q712. Now, did you understand the terms of the contract at that time?

A712. Yes.

Q713. You understood that there was a departure from the previous contract?

A713. Definitely.

Q714. Now, did you understand that this form of con-[fol. 532] tract purported to make the ballroom the employer, both of yourself and of the side men in the orchestra?

Mr. Roberts: Objected to as calling for the opinion as conclusion of the witness, and for a legal conclusion.

By The Witness:

A714. The answer is, yes.

By Mr. Cohen:

Q715. Was it your understanding that the relationship of employer and employee would be created, with the Crystal Ballroom as the employer, is that right?

Mr. Roberts: The same objection, and immaterial and irrelevant, and the witness not shown competent.

By The Witness:

A715. Yes.

By Mr. Cohen:

Q716. Now, at the time this contract was presented to the Crystal Ballroom, was it presented by you or by someone acting in your behalf?

A716. By someone acting in my behalf.

Q717. And that was the Music Corporation of America?

A717. Yes.

Q718. And the Music Corporation of America was authorized by you to enter into a contractual arrangement [fol. 533] for the employment of musicians, is that correct?

A718. Yes.

Q719. Now, are you able to state whether the side men authorized you to engage the Music Corporation of America to negotiate this contract?

A719. I had this contract with the Music Corporation of America before I had any of these particular side men with me.

Q720. Now, when the particular side men came into the aggregation to play or to sing, what was the understanding between you and the side men at that time?

A720. The side men knew that we were an MCA organization to start with.

Q721. Did they know that MCA was the exclusive booking agent? A721. Yes.

Q722. For the organization? A722. Yes.

Q723. Now, did any of the side men ever object to the use of MCA booking agency?

A723. No. Sometimes they used to complain about MCA, "Why don't they get us better jobs?", "or money?"

Q724. Now, can you state whether Roy Bartels, or any [fol. 534] other one of the plaintiffs, doing business as Crystal Ballroom, made known to you or to your agent, any objection to signing this contract?

A724. Please state that again.

Mr. Cohen: Will you read the question?

(The pending question as above recorded was read by the Notary.)

By The Witness:

A724. No.

By Mr. Cohen:

Q725. In other words, they never objected to entering into the Form B contract, is that right?

A725. No.

Mr. Roberts: Objected to as to that, the witness not being shown competent and contrary to the evidence, he having already testified to executing a contract and that the witness had no dealings with the Bartels.

By Mr. Cohen:

Q726. During the engagement at Crystal Ballroom, did any of the plaintiffs ever take issue with any of the terms of the contract?

A726. No.

Q727. So far as you know?

A727. No.

[fol. 535] Q728. During the engagement, or afterwards, did Roy Bartels, or any of the plaintiffs, ever state to you, or to any agent of yours, that the terms of the contract did not represent the agreement between you and the Crystal Ballroom?

A728. No.

Q729. Now, do you understand, Lt. Williams, that this contract, Plaintiffs' Exhibit B, embodies the entire transaction between you and the Crystal Ballroom?

A729. Yes.

Q730. You have read Plaintiffs' Exhibit B, haven't you?

A730. Yes.

Q731. And you agree with the terms of Plaintiffs' Exhibit B representing the arrangement which you entered into, both in your own behalf and as agent for the side men for this engagement on September 1, 1941, is that correct?

A731. Yes.

Q732. Now, were there any terms agreed upon between you and the Crystal Ballroom, or between any agent acting in your behalf, and the Crystal Ballroom, which are at variance with any of the terms of this contract?

[fol. 536] A732. No.

Q733. Then you understand that in representing the side men in your orchestra, you were acting as the agent for the Crystal Ballroom?

Mr. Roberts: Objected to as calling for the opinion and conclusion of the witness. May that objection precede the answer?

Mr. Cohen: Yes.

By The Witness:

A733. Yes.

By Mr. Cohen:

Q734. I believe you testified that you guaranteed the members of your orchestra a certain wage. Now, do I understand correctly, that this guaranty was only for this one engagement on September 1, 1941?

A734. I did not guarantee any wage for them on the engagement, outside of the union scale.

Q735. Is it true then that you understood that the guaranty would cover the union scale for yourself and the side men?

Mr. Roberts: I object as having been asked and answered.

Mr. Cohen: Let me finish that question.

By Mr. Cohen:

Q736. Do I understand correctly, that in stating that [fol. 537] you guaranteed that the side men would receive the union scale, you were merely stating your understanding that, under this contract of September 1st, 1941, engagement, a sufficient remuneration was agreed upon so that both you and the side men would receive at least the union scale?

Mr. Roberts: Objected to as a confusion question and calling for the opinion and conclusion of the witness, and contrary to the facts already in evidence.

By The Witness:

A736. Yes.

By Mr. Cohen:

Q737. Isn't it true, Mr. Williams, that during this period, that is, in September, 1941, you were not obligated to pay your side men any definite wage or salary; is that correct?

A737. Outside of the union scale.

Q738. And isn't it true that you were obligated to pay them the union scale only when they played?

A738. Right.

Q739. Now, these men in your orchestra, Mr. Kirk, Mr. King, Mr. Herman, are they well known in the music profession? A739. They were.

[fol. 538] Q740. At the time of this engagement, September 1, 1941, were they?

A740. I would say they were.

Q741. And they all played at the Crystal Ballroom?

A741. Yes.

Q742. Do you know whether you held yourself out as leader of the orchestra as being able to bring with you as participants in the engagement these particular men?

A742. They were expected to be there, yes.

Q743. Was that understanding conveyed to the Crystal Ballroom? A743. So far as I know.

Q744. And in your advertisements? A744. Yes.

Q745. Now, during the engagement at the Crystal Ballroom on September 1, 1941, was any one or more of the plaintiffs in attendance at the ballroom?

A745. I know Mr. Bartels was there.

Q746. Mr. Roy Bartels? A746. Yes.

Q747. Now, either before or during the engagement, did Mr. Bartels give you any order or request which you refused to obey? A747. No.

[fol. 539] Q748. I believe on direct examination you testified, did you not, that he did suggest or request that you play a certain type of music, to the extent of mixing up your numbers, is that correct? A748. Yes.

Q749. And you complied with that direction?

A749. Yes.

Q750. I believe you referred several times in the course of your examination to your orchestra, or "my orchestra". Just what did you mean by that?

A750. Well, I was the leader and owner of the name, of course. It was not a corporation. It was our organization.

Q751. You were the member who stood in front of the band and wielded the baton? A751. Yes.

Q752. Or directed from the keyboard, is that correct?

A752. Yes.

Q753. Now, is it correct in stating that mutual notices were exchanged, when the relationship between you and the side men terminated, that you meant merely that their association with the aggregation would terminate, and their use of you as a leader for the particular band would cease, is that correct?

[fol. 540] A753. That is right.

Q754. How long have you been a member of the American Federation of Musicians?

A754. I think since 1929, or '8 — '9.

Q755. Are you acquainted with the rules and regulations of the union? A755. Fairly well.

Q756. Are you able to state whether any rules, laws and regulations of the union would interfere with the assumption by you to your side men of the relationship of employes to the Crystal Ballroom for this particular engagement?

Mr. Roberts: Objected to as calling for a legal opinion and conclusion of the witness, the witness not being shown competent.

By The Witness:

A756. Not to my knowledge.

By Mr. Cohen:

Q757. At any rate, it was your understanding at the time that you were entering into such a relationship, is that correct?

Mr. Roberts: Objected to as irrelevant and immaterial.

By The Witness:

A757. That is correct.

[fol. 541] By Mr. Cohen:

Q758. I believe you stated on direct examination that you played substantially the same during the engagement of September 1, 1941, as on a previous occasion when you played at the Crystal Ballroom?

A758. The same type of music.

Q759. Is that what you meant, the same type of music?

A759. Yes.

Q760. Now, on the second occasion, do you feel that your relationship to the ballroom was any different from what it was on the previous engagement?

Mr. Roberts: Objected to as irrelevant and immaterial?

By The Witness:

A760. Not outside of the forms of the contract.

Mr. Roberts: I withdraw the objection.

By Mr. Cohen:

Q761. Did you feel that you were—when you say, "not outside of the terms of the contract," Lt. Williams, do you mean that whereas previously if you acted in pursuance of the terms of the contract, you would not be subject to the control of the Crystal Ballroom, on September 1, 1941; acting pursuant to the terms of the contract you were sub-
[fol. 542] ject to that control; is that what you mean?

Mr. Roberts: Objected to as being confusing.

Mr. Cohen: Strike that question, please; it is confusing.

Read the last answer of the witness.

(The last answer as above recorded was read by the Notary, as follows:

"A. Not outside of the forms of the contract.")

By Mr. Cohen:

Q762. What do you mean by that?

A762. There is no difference in the actual operation of that—with the new contracts; if Bartels wanted to exercise more control, or any type of control over us he could have.

Mr. Cohen: No further questions.

Mr. Wilson: I have a couple of questions I want to put in there.

Recross Examination.

By Mr. Wilson:

Q763. Were minimum wages for yourself and for the side men for each engagement determined by the union scale in existence in the various localities in which you played?

[fol. 543] A763. Right.

Q764. And the minimum wage for the engagement on September 1, 1941 —

A764. Yes.

Q765. —for the engagement at the Crystal Ballroom was determined how?

A765. By the union, the local union of Dubuque, Iowa.

Q766. By the local union of Dubuque, Iowa?

A766. Yes.

Q767. In other words, they established the minimum wage scale?

A767. They established the minimum wage scale.

Q768. And not you? A768. And not me.

Q769. Did the Crystal Ballroom, prior to your playing there on September 1, 1941, request the names and identities of the members of your orchestra?

A769. Not that I know of.

Q770. They did not come to you and ask for the names?

A770. No.

Q771. And you did not volunteer them? A771. No.

Q772. Now, you spoke of guaranteeing the wages to the [fol. 544] side men. I think that ought to be explained for the record. Did you guarantee to your side men that they would receive a certain specified amount of money over a certain period of time; or did you merely state that they would receive a certain amount of money for a particular engagement?

Mr. Roberts: Objected to as having already been asked and answered.

By The Witness:

A772. As of a particular engagement, they received a certain amount of money.

By Mr. Wilson:

Q773. You were not obligated by any contract or any arrangement with any member of your orchestra, that the union scale or any other amount be paid any member of the orchestra?

Mr. Roberts: Objected to as already having been asked and answered at least ten times in this record, the witness having stated again and again that he guaranteed the minimum union scale.

By The Witness:

A773. I always guaranteed—it was understood that they would get the union scale.

By Mr. Wilson:

[fol. 545] Q774. If a particular establishment breached its contract and did not pay the contract price, were you obligated to pay it?

A774. No. I think I would take them down to the union and have the union fight it.

Q775. Is that all regulated by the union rules and regulations?

A775. Yes. That has happened many times, where the union collected for an engagement where they were unpaid.

Mr. Wilson: Those are all of the questions.

Redirect Examination.

By Mr. Roberts:

Q776. But unless you always collected from the establishment enough to pay them, you would have to pay them?

A776. No. I don't think the union has failed to pay them.

Q777. Where it has not been collected from the establishment, were you not obligated to pay the men?

A777. No, not that I know of.

Q778. There may have been such cases, though?

A778. I doubt it; I don't know.

[fol. 546] Q779. You don't remember?

Mr. Wilson: I object to that except as it relates to this case.

By Mr. Roberts:

Q780. You don't know, do you?

A780. No, I don't.

Q781. Are you sure?

Mr. Wilson: I was going to object.

By Mr. Roberts:

Q782. Now, you mentioned that you understood the engagement of September 1, 1941, as being covered by the terms of the Form B contract.

A782. Yes.

Q783. You stated that on the cross-examination.

A783. Yes.

Q784. And you know, don't you, having stated that you read the terms, that the by-laws are made a part of the contract?

A784. Yes.

Q785. So that the engagement was also subject to the by-laws which were a part of this contract?

Mr. Wilson: I object. The contract speaks for itself.

By Mr. Roberts:

Q785. (Continuing) Is that correct?

[fol. 547] A785. Yes.

Q786. Now, you mentioned early in your cross-examination that the proceeds from some engagements did not come up to your expectations?

A786. Yes.

Q787. By that you mean they were not profitable to you, don't you?

A787. Yes.

Q788. In other words, you personally would have received more money had they been profitable, is that right?

A788. Yes.

Q789. Now, you have had considerable testimony on these featured members.

A789. Yes.

Q790. Just to have the record straight, you decide about who should be featured members, don't you?

A790. Yes.

Q791. When there were changes in the Warblers, for example, you determined that, didn't you?

A791. Yes.

Q792. One other thing, just to clear it up. You mentioned the promoter paid for advertising.

A792. Correct.

Q793. On occasions, that is, advertising in the papers?

[fol. 548] A793. Yes.

Q794. The advertising is in the local papers, isn't it?

A794. Yes.

Q795. You don't intend to convey the impression he paid for this photograph of yourself and the orchestra, and the publicity manuals which have been offered in evidence?

A795. No. He paid for distribution.

Q796. If the mats were published in the papers, who paid for that?

A796. He paid; he would pay for the poster.

Q797. The MCA paid for this publicity matter that has been introduced in evidence?

A797. Yes.

Q798: As a matter of fact, Lt. Williams, except for the form of the contract, there was not one iota difference between your second engagement and your first engagement, was there, in the Crystal Ballroom?

Mr. Wilson: I object to that.

By the Witness:

A798. Not much, as I remember.

By Mr. Roberts:

[fol. 549] Q799. It was just the same way you operate?

A799. As far as I remember.

Q800. The contract was the only thing now that was different, isn't that right?

Mr. Cohen: I object.

Mr. Wilson: I object.

Mr. Cohen: The question has been asked and answered.

By Mr. Roberts:

Q800. (Continuing) Isn't that right?

A800. Fundamentally the same.

Q801. You mentioned a number of hotels gave you some directions which you described, with reference to the intermission, and so forth. Did the hotels at which you played during the year 1938 give you some directions?

A801. The same—not always; the same type.

Q802. The same type? A802. Probably, yes.

Q803. They told you where to take your engagements?

A803. Yes. Each hotel is a different picture in the story. I mean, some have regulations on one thing that does not apply.

Q804. The practice you described during 1941 after September, that often happened in 1938, too, didn't it?

[fol. 550] A804. Probably.

Q805. That is, instructions from the hotel people to mingle with the guests or not?

A805. It did on some occasions.

Q806. In 1938? A806. Yes.

Q807. You also had rehearsals then in 1938, didn't you?

A807. Yes.

Q808. At the direction of the hotels? A808. Yes.

Q809. And sometimes rehearsals were independent acts; that is, floor shows? A809. Yes.

Mr. Roberts: I believe that is all.

Recross Examination.

By Mr. Wilson:

Q810. One more point in the record, to make it absolutely clear and certain; it is probably repetitious. But I would like to ask Lt. Williams if, subsequent to June of 1941 when the Form B contract came into use, were all your contracts—were all the contracts between the orches-
[fol. 551] tra and the establishment signed by you and filled out completely on the back, except this particular one on September 1, 1941?

Mr. Roberts: Objected to, not the best evidence.

By the Witness:

A810. The great majority of them, but I cannot truthfully state all.

By Mr. Wilson:

Q811. Can you recall any others that were not filled out?

A811. No.

Recross Examination.

By Mr. Cohen:

Q812. Mr. Williams, do I understand you correctly, you understood that you would operate the same, under—for this particular engagement on September 1, 1941, as you would for engagements which were contracted for on other Form B contracts, despite the fact that by and through some oversight, or some other reason, the names of the particular musicians were omitted, is that correct?

A812. Yes, that is right.

Mr. Roberts: I believe that is all.

[fol. 552] Mr. Wilson: No further questions.

(Deposition closed.)

The reading of his foregoing fully transcribed deposition and the signing thereof by the said witness, Griffith E. Williams, were, by stipulation by and between counsel for the respective parties present at the taking of said deposition, and by the witness, duly waived:

(Seal) (Signed) FRANK M. HARKER,
Notary Public, Cook County, Illinois.
My Commission expires Feb. 25, 1946.

The printed documents, photographs and paper exhibits heretofore marked for identification as Plaintiffs' Exhibits A through and including K for identification, and so offered in evidence by counsel for plaintiffs, are attached hereto and are in words and figures following, to-wit:—

138

MUSIC CORPORATION OF AMERICA

REPRESENTING

No. 1279 CO

SEPTEMBER 14, 1940 RP:MS

GRIFF WILLIAMS AND HIS ORCHESTRA
(Attraction)

(Number of artists or musicians)

The undersigned employer engages the attraction above named and attraction agrees to perform upon the following terms:

Date(s) of engagement OCTOBER 13, 1940

Place of engagement CRYSTAL BALLROOM

Street Address ..... City and State DUBUQUE, IOWA

HOURS AND SPECIAL INSTRUCTIONS:

Attraction agrees to play or perform for three consecutive hours (with usual intermissions) beginning at 9:00 P. M. Standard Time at place of engagement, unless otherwise herein provided. PLACE OF ENGAGEMENT MUST BE SPECIFIED

DEPOSIT TO BE MADE BY MONEY ORDER, BANK DRAFT OR CASHIERS CHECK.

HOURS: 9 P.M. to 1 A.M. o'clock

"Management, MUSIC CORPORATION OF AMERICA"

Must appear in all announcements and advertising matter of employer wherever the name of the attraction is used. PRIVILEGE SIXTY PERCENT OF GROSS RECEIPTS, GUARANTEE

Price agreed upon $ $00.00

Deposit $ 150.00 (Certified Check, Money Order, or Bank Draft)

Balance to be paid in United States currency to Attraction Leader or Music Corporation of America, on its demand before 10:00 P. M. on date of engagement, or earlier on his or its demand.

Received 150.00
7-16 19
M. C. A. by

Overtime Charge

It is agreed that all the laws, rules, and regulations of the American Federation of Musicians are a part of this contract. Employer agrees to pay the difference, if any, between the compensation herein provided and a sum equal to five (5%) per cent over the Federation scale in effect. Terms of resale of attraction by Employer must comply with regulations and prices of the Federation Local wherein attraction is to perform. In signing this contract, the Employer acknowledges his (her or their) authority to do so, and also hereby assumes liability for the amount stated herein. Agreement of attraction to perform is subject to detention by sickness, accident, or accident to means of transportation used by attraction, or by any act or regulation of any public authority, civil tumult, strike, epidemic, serious interruption of transportation services or any legitimate or unavoidable cause, strikes, Acts of God, and conditions beyond control of such attraction or representative. There are no exceptions to this contract unless stipulated in writing. No deductions are to be made for any reason whatsoever.

The Employer agrees that the business agent of the Musicians' Local in whose jurisdiction this engagement is being played may have access to the function, for the purpose of conferring with the Musicians playing this engagement.

Music Corporation of America, or the undersigned employee on its behalf, acts only as agent and does not assume any obligation whatsoever, including but not limited to, any obligation imposed under and by virtue of the Social Security Act of the United States in connection with the services rendered ~~and assumed hereunder by the Attraction~~.

No part of the performance of attraction shall be broadcast by radio or otherwise.

If the compensation of Attraction is on a guarantee and percentage basis, then employer agrees:

(A) to use no passes except to bonafide newspaper representatives and not to reduce the stipulated dancing or admittance charges as herein fixed.

(B) that the dancing charge shall be

PER COUPLE $; MALE $; FEMALE $; SPECTATOR $

(C) that the additional (gate) charge (if any) for admittance shall be

PER COUPLE $; MALE $; FEMALE $; SPECTATOR $

(D) that the charge for auto parking shall be $; for clothes checking $

(E) M. C. A. shall have the privilege of using its own tickets exclusively, and also of appointing its own ticket takers, who shall take tickets at all entrances

YOU SIGN HERE

Accepted by Employer CRYSTAL BALLROOM BY ROY BARTELS

Street Address City and State DUBUQUE, IA. Phone

DO NOT WRITE BELOW THIS LINE

RETURN ALL COPIES SIGNED TO

Attraction Sign Here

By MUSIC CORPORATION OF AMERICA
Authorized Representative

Per

MUSIC CORPORATION OF AMERICA
430 N. MICHIGAN AVENUE
CHICAGO

American Federation of Musicians
License No. 1

FORM 1N

Plaintiffs' Exhibit "A" attached to Deposition.

399

Contract Blank

RECEIVED
CHICAGO OFFICE
MUSIC CORPORATION
OF AMERICA
1941 JUL 31 PM 1:32

MUSIC CORPORATION OF AMERICA

18 Old Bond St., W. 1. LONDON Phone Regent 6808 | 745 Fifth Avenue NEW YORK Phone Wisconsin 7-8800 | 430 N. Michigan Ave. CHICAGO Phone Delaware 1100 | M C A Building BEVERLY HILLS Phone Bradshaw 22211 | 111 Sutter Street SAN FRANCISCO Phone Exbrook 0932 | Union Commerce Bldg. CLEVELAND Phone Cherry 6010 | Mercantile-Commerce Petroleum Bldg. DALLAS Phone 2-1402

THIS CONTRACT for the personal services of musicians, made this 26 day of JULY, 1941

between the undersigned employer (hereinafter called the employer) and 13 (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agrees to render collectively to the employer services as musicians in the orchestra under the

leadership of GRIFF WILLIAMS, according to the following terms and conditions:

Place of employment CRYSTAL BALLROOM, DUBUQUE, IOWA

Date(s) of employment SEPTEMBER 1, 1941

Hours of employment 9 PM to 1 A.M.

Price agreed upon $ 350 GUARANTEE WITH A 60% PRIVILEGE OF THE GROSS RECEIPTS
(Terms and amount)

To be paid $125 DEPOSIT, BALANCE BY 11 PM NIGHT OF ENGAGEMENT
(Specify when payments are to be made)

Plaintiffs' Exhibit "B" attached to Deposition.

Plaintiffs' Exhibit B for ID

Last 12.5 on 7.31.42

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer CRYSTAL BALLROOM
by ROY BARTELS

Street Address 1545 AUBURN ST.

City or State DUBUQUE, IOWA

Phone

Accepted by Employer Roy Bartels

Accepted

(Orchestra Leader)

By

MUSIC CORPORATION OF AMERICA

FORM B
44 Printed in U. S. A.

401

[fol. 555] Plaintiff's Exhibit C, attached to deposition of Griffith E. Williams

Griff Williams
And His Orchestra

Publicity
Section

In Newspaper Style

Typewritten, Double Spaced for Local Injections or Corrections . . . . . .

Temporary Heads Suggest Each Story's Angle With Plenty of Room for Your Editor to Write His Own Head . . . . Plain . . . . Readable . . . . Practical.

An assortment of one and two column news and ad mats and two color window cards, 14 x 22 are available.

May we suggest that you do not detach stories from manual? Instead, make typewritten releases, double spaced, which include your dates and location. It has been proven that newspapers give more attention to stories that appear to have been written locally.

Music Corporation of America

London New York Chicago Beverly Hills Dallas Cleveland San Francisco

[fol. 556] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois.

Billing Sheet: This is the correct billing.
Please do not deviate from it.

Music Corporation of America

presents

Griff Williams
And His Orchestra

featuring

Walter King—personable Irish tenor
Bob Kirk—baritone balladeer

and the

Williams Warblers

MCA

Note: Do not detach the stories contained in this manual. Instead make typewritten copies, double spaced, inserting date and location. Newspapers pay more attention to stories that appear to have been written locally.

MCA

J-C

[fol. 557] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois.

Recent Outstanding Engagements Of Griff Williams & His Orchestra

Stevens Hotel	Chicago
Mark Hopkins Hotel	San Francisco
Aragon Ballroom	Chicago
Trianon Ballroom	Chicago
Peabody Hotel	Memphis
Chase Hotel	St. Louis
Netherland Plaza Hotel	Cincinnati
Baker Hotel	Dallas
Adolphus Hotel	Dallas
Elitch's Gardens	Denver
Palomar	Los Angeles
Victor Hugo's	Los Angeles
Schroeder Hotel	Milwaukee

MCA

J-O

[fol. 558] Press Relations Department.
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Coming direct from the world famous Empire Room of the Palmer House in Chicago where he recently finished a long and successful engagement, Griff Williams brings his famous orchestra to the ..... for a limited engagement, thru arrangements with Music Corporation of America.

During his stay at the Palmer House, Griff broadcast nightly over the powerful WGN and Mutual network and was heard by millions of listeners from coast to coast. His smooth, suave, and danceable music was so highly rated by both the management and the patrons of the Empire Room that he is slated to return every year for the next five years.

Recently Griff and his orchestra were awarded a recording contract by Columbia Records on the Okeh label. Their ever increasing popularity and consistent airtime were some of the reasons for the contract.

The releases so far made by Griff have been very successful and can be heard on juke boxes throughout America. We believe it is safe to predict the Griff Williams band will be one of the top orchestras for 1942. Don't fail to see and hear him when he comes to the ..... on .....

MCA

L/1

[fol. 559] 430 North Michigan Avenue.
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams brings his famous orchestra to ..... on ....., through arrangements with Music Corporation of America.

Griff has a dynamic personality. In the course of an evening he will double at the piano, call the numbers for a square dance, or give a la conga exhibition himself.

A wily maestro, he was one of the first to recognize the trend to revive old favorites, Latin-American music, and waltzes.

This band, which recently smashed all records at the world's largest hotel, the Stevens in Chicago, has been a favorite of "straight" music fans at choice hotels, night clubs, theatres throughout the country, including, among others, the exclusive Aragon and Trianon Ballrooms, Chicago; the Peabody Hotel, Memphis; the Chase Hotel, St. Louis; the Netherland Plaza, Cincinnati; the Baker and Adolphus Hotels, Dallas; Elitch's Gardens, Denver; Palomar and Victor Hugo's in Los Angeles; the Schroeder Hotel, Milwaukee; and the Mark Hopkins in San Francisco where they stayed for four years.

They record for Varsity Records and are heard on the air over NBC, CBS, and MBS networks and on the Fitch Bandwagon program.

Featured with the band are Walter King, the personable Irish tenor, rich-toned Bob Kirk; baritone balladeer, and the Williams Warblers.

MCA

J-O

[fol. 560] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Gri. Williams & His Orchestra (2).

Among the spectators was Dorothy Bostwick of San Francisco's Junior League. She is now Mrs. Griff Williams.

MCA

J-O

[fol. 561] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

"I watch dancers' lips, as well as their feet, to learn if my music pleases," explains Griff Williams, who brings his

famous band to.....on.....
through arrangements with Music Corporation of America.
"If they sing, whistle, or hum as they dance by the bandstand, it's pretty good proof that the music is O.K."

Griff also taboos tricky or heavy orchestral arrangements. His are light and frothy and played as the composer intended—with the melody always distinguishable.

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"They can wear themselves out faster by shouting over orchestra din than by dancing," believes Griff. He strives for soft, mellow and subtle effects in swing as well as sweet music.

Griff's music has been popular in the Stevens Hotel, Chicago, where he broke all records; in the exclusive Aragon and Trianon Ballrooms in the same city; the Peabody Hotel, Memphis; the Chase Hotel, St. Louis; the Netherland Plaza, Cincinnati; the Baker and Adolphus Hotels, Dallas; Elitch's Gardens, Denver; the Palomar and the Victor Hugo, Los Angeles; the Schroeder Hotel in Milwaukee; and the Mark Hopkins Hotel in San Francisco where he played a record engagement of four years.

MCA

J-O

[fol. 562] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Playing late into the morning, band leaders like Griff Williams, who will appear with his orchestra at.....
.....on....., through arrangements with Music Corporation of America, seldom see the sun.

But that does not keep Griff from being athletic and, on occasion, a bit of a daredevil. It was during the first of his

four years' run at the famous Mark Hopkins Hotel in San Francisco that Griff performed the feat which "Friscans" are still talking about.

A guest who was one of the engineers constructing the great San Francisco Oakland Bay Bridge teased Griff about his sedentary life. Thoughtlessly Griff bet that he could do anything in the way of physical activity that the engineer could. Immediately the latter proposed that they walk across the catwalk of the incompleted bridge. Griff wanted to back out, but a considerable number of his fans had collected to hear the argument and he had to go through with the dare.

A large crowd accompanied them to the waterfront. Both men were equipped with life-preservers and searchlights, and a police motor launch and several pleasure boats trailed underneath to pick up whoever would fall.

The engineer, who knew the way, went first. Just short of his goal he turned around to see how far behind Griff was—and fell into the water.

[fol. 563] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

The breaks fall to Griff Williams, popular leader of the orchestra which will appear at.....on ....., through arrangements with Music Corporation of America.

His first came when he was substituting at the piano for Anson Weeks, who was on vacation. On his return, Weeks slipped on the soap in his shower and sprained his wrist. So Griff was kept on. Listening to him, Anson got to like him. When Weeks' wrist was good enough to play again, he changed the instrumentation of the band to make room for both himself and Griff.

It was from another member of Anson's band, incidentally, that Griff first got this thorough training in Latin-American music which makes him a favorite today among

followers of the rhumba and la conga. His instruction was a violinist from Spain named Xavier Cugat.

On location he often organizes "La Conga" nights and acts as an instructor himself. He takes his congaing so seriously that he once threw his back out of joint dancing with Producer Ruth Selwyn.

MCA

J-O

[fol. 564] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams was born in the Dalles, Oregon, but went to Stanford for his higher education.

He planned to be a physician but developed such an interest in music that he was given complete charge of all campus musical productions. For one of them, he wrote "Dream Music," now his theme song.

He went on with his pre-medical preparations, however, until an automobile accident changed the course of his life.

Griff smashed to smithereens a car belonging to a classmate who had planned to sell it to finance his next year in school.

Resolved that his pal should not stop his education because of him, Griff borrowed money to cover the cost of the car and then proceeded to pay it off by becoming a bandleader. Medicine would have to wait. It is still waiting.

Although he was sure now that music was his calling, Griff was not certain whether to try his hand at composing rather than leading. A Broadway producer persuaded him to write the score of a show. It was tried out in San Francisco and closed "before they could get the curtains open." So Griff became the leader of the famous band which will appear with him at.....on....., through arrangements with Music Corporation of America.

MCA

J-O

[fol. 565] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams, who will bring his famous orchestra to .....on....., through arrangements with Music Corporation of America, believes that cooking is a man's job. To back up his statement, he points out that the famous chefs are men, not women.

Publicly challenged to produce more than talk, by Miss Mildred Hickman, nationally known home economist, Griff recently cooked his notorious "Onion Soup a la Williams" before an audience of three hundred salivating women.

Stepping up to a new electric range, Griff called for two large onions, four potatoes, six slices of bacon, two tablespoonsful of butter, two boullion cubes, three cups of milk, salt, pepper, and paprika.

Then he diced the potatoes and steamed them until they were tender. He sliced the onions and sauted them until they were brown, then added bacon cut in strips and fried them until they were crisp.

While the hordes of women watched for him to make a mis-step, Griff seasoned to his taste with salt, pepper, and paprika, combined the cooked potatoes and the onion-bacon mix in a two-quart utensil and added milk.

He replaced it on the range, added boullion cubes, heated it until the cubes dissolved, served it,—and dashed off to a rehearsal.

MCA

J-O

[fol. 566] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Songs are like clothes fashions; according to Griff Williams who will appear with his famous orchestra at .....

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To prove his statement, the wily young maestro pointed to the present revival trend among the pace-setting bands in the country. Today, he observed, orchestra leaders are reviving one old song to every three new ones they add to their dance repertoires. Songs popular as far back as 1912 are finding their way into dance band repertoires in the form of medleys.

The current revival of square dancing, (for which Griff deserves considerable credit), has returned to prominence many of the "barnyard arias" popular a long time ago. Orchestras today must be prepared to answer requests for "Turkey in the Straw," "Old Macdonald," and the "Old Gray Mare."

One of the first to sense this trend, Griff has recently added to his list several "new-old-timers." Among them are "My Honey's Lovin' Arms," 1912; "They Go Simply Wild Over Me," 1917; "Everybody Shimmies Now," 1918; and "It Made You Happy When You Made Me Cry," 1926. Griff's recording of the "oldie," "Down by the Ohio," was, of course, a best-seller.

MCA

J-O

[fol. 567] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

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His mother, a concert singer, wished him to be musical also. Griff appealed to his father, who made a deal with him: when Griff had mastered his dad's pet tune, "The Barber Shop Chord," he could quit playing.

But by the time he had learned it, however, he had grown to love the piano. He continued lessons under a German "professor" who made him play with a silver dollar on the top of each hand. If a dollar fell off he was punished.

By the time he was ten he was playing accompaniments for his mother. At twelve he had mastered the pipe organ to which, for a while, his interest switched. He played the organ in movie houses during his high school and early years at Stanford, until the advent of the talkies.

Pre-medical training interfered with his music for a while, although he managed to write all the campus musical productions at Stanford and take part in Ram's Head and Hammer and Coffin activities.

His medical career was cut off by the accidental smashing of a friend's car, for which he insisted on paying. To make the money he organized a band and took it into the famed Edgewater Beach Hotel in San Francisco. Following that, a two weeks' engagement at the Mark Hopkins Hotel lasted four years — and the climb to fame had begun.

MCA

J-O

[fol. 568] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

"The old-fashioned waltz is not only coming back — it's here, and is seriously challenging the 'jitterbug gymnastics' which have exhausted dancing America for the past several years!" So spoke genial Griff Williams, as he was preparing for his appearance at ..... on ....., through arrangements with Music Corporation of America.

His remark is based on his own actual observations while playing at leading hotels like the Stevens in Chicago, and the Mark Hopkins in San Francisco, among many others, as well as from reports of leader-friends in other parts of the country.

The consensus of opinion is that dancers today prefer to do modern interpretations of the old-fashioned waltz and two-step. The slow glide is replacing the bounce and hop of the swing dance era with collegians and prep school dancers, as well as with older folks.

Many children of the swing era have never even danced the waltz. Consequently their reactions are as enthusiastic as those associated with a new trend. Those who remember when the waltz was the No. 1 dance, now welcome its return.

Coincidental with the waltz trend is the public's demand for slow tunes, and ballads for dancing as well as listening. Meodies like "Stardust," "Body and Soul," and "Smoke Gets In Your Eyes," have become standards in the Williams repertoire because they are requested nightly.

Latin-American tunes, too, supplying their own dance steps, have rhumbad and la congad to popularity. On location Griff often features a "La Conga" night, with himself as one of the instructors. He sprained his back once doing la conga with Producer Ruth Selwyn.

MCA

J-O

[fol. 569] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams learned to play the piano with a silver dollar balanced on the back of each hand . . . The debate as to whether slim Griff resembles Fred Astaire more than Noel Coward cannot be settled by pointing out that Griff is about half a foot taller than either of them — and handsomer . . . Although a la conga expert (he once threw his back out of joint dancing with Producer Ruth Selwyn) he does not dance as well as Astaire — or write or act as well as Coward . . . At hotel locations Griff often runs "La Conga" and "Square Dance" nights, acting as an instructor himself . . . His wife, of recent date, is the former Dorothy Bostwick of San Francisco's Junior League . . .

Griff has been a puppeteer since he was thirteen and often entertains his friends at home with puppet shows he builds, improvises, and manipulates himself . . . On the road his favorite reading is a world atlas, and he conducts a quiz from it amongst his pinochle-playing men . . . His name was always Griff — never Griffith or Griffin, as some people suspect.

MCA

J-O

[fol. 570] Exclusive Management

Music Corporation of America

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Chicago
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Phone Delaware 1100

Beverly Hills
M C A Building
Phone Bradshaw 23211

San Francisco
111 Sutter Street
Phone Exbrook 8922

Cleveland
Union Commerce Bldg.
Phone Cherry 6010

Dallas
Tower Petroleum Bldg.
Phone 2-1448

Seven Offices To Serve You—Each A Complete Unit In Itself

[fol. 570a] Plaintiff's Exhibit D, attached to deposition of Griffith E. Williams

Griff Williams

And His Orchestra

Publicity Section

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Typewritten, Double Spaced for Local Injections or Corrections . . . . .

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Music Corporation of America

London New York Chicago Beverly Hills Dallas San Francisco

[fol. 571] Publicity

M C A

Music Corporation of America

[fol. 572] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Billing Sheet: This is the correct billing.
Please do not deviate from it.

Music Corporation of America

presents

Griff Williams

And His Orchestra

featuring

Walter King—personable Irish tenor
Bob Kirk—baritone balladeer

and the

Williams Warblers

MCA

Note: Do not detach the stories contained in this manual. Instead make typewritten copies, double spaced, inserting date and location. Newspapers pay more

attention to stories that appear to have been written locally.

MCA

J-O

[fol. 573] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Recent Outstanding Engagements Of Griff Williams & His Orchestra

Stevens Hotel	Chicago
Mark Hopkins Hotel	San Francisco
Aragon Ballroom	Chicago
Trianon Ballroom	Chicago
Peabody Hotel	Memphis
Chase Hotel	St. Louis
Netherland Plaza Hotel	Cincinnati
Baker Hotel	Dallas
Adolphus Hotel	Dallas
Elitch's Gardens	Denver
Palomar	Los Angeles
Victor Hugo's	Los Angeles
Schroeder Hotel	Milwaukee

MCA

J-O

[fol. 574] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

Griff Williams brings his famous orchestra to .... on .....; through arrangements with Music Corporation of America.

Griff has a dynamic personality. In the course of an evening he will double at the piano, call the numbers for a square dance, or give a la conga exhibition himself.

A wily maestro, he was one of the first to recognize the trend to revive old favorites, Latin-American music, and waltzes.

This band, which recently smashed all records at the world's largest hotel, the Stevens in Chicago, has been a favorite of "straight" music fans at choice hotels, night clubs, theatres throughout the country, including, among others, the exclusive Aragon and Trianon Ballrooms, Chicago; the Peabody Hotel, Memphis; the Chase Hotel, St. Louis; the Netherland Plaza, Cincinnati; the Baker and Adolphus Hotels, Dallas; Elitch's Gardens, Denver; Palomar and Victor Hugo's in Los Angeles; the Schroeder Hotel, Milwaukee; and the Mark Hopkins in San Francisco where they stayed for four years.

They record for Varsity Records and are heard on the air over NBC, CBS, and MBS networks and on the Fitch Bandwagon program.

Featured with the band are Walter King, the personable Irish tenor, rich-toned Bob Kirk, baritone balladeer, and the Williams Warblers.

MCA

J-O

[fol. 575] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra (2)

Among the spectators was Dorothy Bostwick of San Francisco's Junior League. She is now Mrs. Griff Williams.

MCA

J-O

[fol. 576] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

"I watch dancers' dips, as well as their feet, to learn if my music pleases," explains Griff Williams, who brings his famous band to ..... on ..... through arrangements with Music Corporation of Ameri-

ca. "If they sing, whistle, or hum as they dance by the bandstand, it's pretty good proof that the music is O. K."

Griff also taboos tricky or heavy orchestral arrangements. His are light and frothy and played as the composer intended with the melody always distinguishable.

Loud, blatant music is out too, so far as the Williams organization is concerned. In Griff's opinion, dance music should be "listenable" as well as danceable. Guests "sitting out" should not have to strain or raise their voices above normal tone to be heard across the table.

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MCA

J-O

[fol. 577] Press Relations Department
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Chicago, Illinois

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MCA

J-O

[fol. 578] Press Relations Department
Music Corporation of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

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MCA

J-O

[fol. 579] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

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MCA

J-O

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Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

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MCA

J-O

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Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

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MCA

J-O

[fol. 582] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

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MCA

J-O

[fol. 583] Press Relations Department
Music Corporation Of America
430 North Michigan Avenue
Chicago, Illinois

Griff Williams & His Orchestra

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MCA

J-O

[fol. 584]

Exclusive Management

Music Corporation Of America

Producers of the World's Foremost Artists, Orchestras and Entertainment

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Phone Bradshaw 23211

San Francisco
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Tower Petroleum Building
Phone 2-1448

London
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Plaintiffs' Exhibit "E" attached to Deposition.

GRIFF WILLIAMS and his ORCHESTRA

MCA
MUSIC CORPORATION OF AMERICA

CHICAGO
STATE 5806

425

Plaintiffs' Exhibit "F" attached to

" attached to Deposition.

Frank M. Harker
Notary Public

427

Plaintiffs' Exhibit "G" attached to Deposition

Plaintiffs' Exhibit "I" attached to Deposition

COMING!
IN PERSON
MCA PRESENTS
A RARE TREAT
GRIFF
Williams
AND HIS FAMOUS
ORCHESTRA

GRIFF WILLIAMS

[fol. 606] Depositions of James K. Breyley and Joseph L. Kayser.

Filed in U. S. District Court December 11, 1944.

JAMES K. BREYLEY, of lawful age, having been by me, the said Roy B. Fuller, as Notary Public and Commissioner, as aforesaid, first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, was examined upon oral interrogatories, and he did thereupon depose, testify, and say as follows, viz.:

Direct Examination.

By Mr. Roberts:

Q1. Please give your name to the reporter.

[fol. 607] A1. James K. Breyley.

Q2. And where do you live, Mr. Breyley?

A2. 128 Church Road, Winnetka, Illinois.

Q3. What is your occupation?

A3. Executive booker of the Music Corporation of America.

Q4. What business is Music Corporation of America in?

A4. Booking bands, orchestras, artists, acts, and so forth—entertainment.

Q5. How long have you been with MCA?

A5. Eight years.

Q6. And by "MCA" you know that I refer to Music Corporation of America.

A6. Yes.

Q7. What are your duties as an employe of Music Corporation of America?

A7. Booking bands, orchestras and acts.

Mr. Cohen: I didn't get that, please.

The Witness: Booking bands, orchestras and acts.

By Mr. Roberts:

Q8. And were your duties much the same during the year 1941?

A8. Yes, about the same.

[fol. 608] Q9. Has your work for Music Corporation of America acquainted you with various orchestras who have leaders that have booking agreements with MCA?

A9. I would say so.

Q10. As a matter of fact, Mr. Breyley, what can you tell us as to whether you have to be familiar with orchestras, and their history, and their quality of music, in order to give information to people that are users, or that might be interested in the booking of bands?

Mr. Wilson: I think I had better object, until we get the foundation, as to what necessary information is required by people that want the bands.

Mr. Roberts: Go ahead and answer the question. That is just an objection for the record.

The Witness: Will you repeat your question, please?

(The pending question as above recorded was read by the reporter.)

By The Witness:

A10. We have to know the type of band we are selling; approximately the number of people; and where they have worked.

By Mr. Roberts:

[fol. 609] Q11. And something about the style of music?

A11. Yes.

Q12. Your work brings you in contact with persons that are looking for the services of orchestras, doesn't it?

A12. Yes.

Q13. And you may solicit other persons that you think may need the services of an orchestra?

A13. That is right.

Q14. What is your practice, if any, in soliciting engagements by MCA orchestras, with reference to advising a prospective music user of a particular orchestra's style or quality of music?

A14. What do you mean by — did you say "method"?

Q15. Practice.

Mr. Roberts: Read the question.

(The pending question as above recorded was read by the reporter.)

By The Witness:

A15. We have to describe it to him — on the phone, or a letter, or a wire, describing the type of band.

By Mr. Roberts:

Q16. And that is your custom, isn't it?

A16. That is right.

Q17. And that was true in 1941?

[fol. 610] A17. Yes.

Q18. What can you tell us as to whether Bill Carlsen and His Orchestra was one of the orchestras that you were familiar with, or acquainted with in MCA?

A18. I booked Bill Carlsen for quite a while.

Q19. Did he have a booking agreement and management contract with Music Corporation of America?

A19. Yes.

Q20. Do you recall when he first had such a booking agreement?

A20. I don't remember the exact time; I think somewhere in 1937 or 1938 — I should think, would be the starting time.

Q21. How long was such an agreement in existence?

A21. I don't remember the terms of the Carlsen contract; it is very possible it was a twenty-year contract — I think most of them were at that time.

Q22. Do you know how long it was before MCA became—

Mr. Cohen: (Interpolating) You said, "A twenty-year contract"?

The Witness: There was a twenty-year contract at that time. I cannot state that there was such a contract— that he had signed such a contract; I don't remember what the terms of his contract were.

[fol. 611] Mr. Wilson: Yes.

The Witness: But there were twenty-year contracts at that time; I think most of them were.

Mr. Cohen: I don't think his answer was responsive to your question.

Mr. Roberts: I am going to clear that up.

By Mr. Roberts:

Q23. Did he have more than one contract with Music Corporation of America; or do you know that?

A23. More than one management contract?

Q24. Yes.

A24. Not that I know of. I think Bill Carlsen has been out of business for about two years — two and a half years.

Q25. So that in other words —

Mr. Wilson: (Interpolating) I move that that voluntary answer be stricken there, the statement.

By Mr. Roberts:

Q26. Did I understand you to state that he had been out of business, for the last couple of years — Bill Carlsen?

Mr. Wilson: I will object to that, on the basis that it is immaterial.

[fol. 612] By The Witness:

A26. Yes.

By Mr. Roberts:

Q27. What can you tell us as to approximately the number of years that Bill Carlsen's Orchestra was in existence?

A27. I have known the band since about 1935.

Q28. Who assembled the orchestra, if you know?

A28. I don't know.

Q29. You don't know that?

A29. No, I don't; it would be my opinion that Carlsen assembled it.

Mr. Cohen: I object to the opinion of the witness.

By Mr. Roberts:

Q30. State whether you were the employe of Music Corporation of America who handled most of the bookings of Bill Carlsen's band?

A30. Yes, I handled most of Carlsen's bookings.

Q31. State what types of establishments were solicited, or contacted for engagements by Bill Carlsen and his orchestra.

A31. Well, theatres, ballrooms, parks, hotels, various organizations—like firemen's organizations, policemen's organizations, the Elks, Masonic Lodges, and school [fol. 613] parties.

Q32. College classes?

A32. College parties, proms, and so forth.

Q33. What can you tell us as to the length of some of those engagements?

A33. Some of them were one night, some were two-night, some a week, some ran as long as two or three or four weeks; I think he had one contract at the Trianon that was several months—he was there on different occasions, and I do not remember the length of the time of each contract.

Q34. And what can you tell us as to whether his band played engagements for those various types of establishments during the period that he had a booking agreement with Music Corporation of America?

The Witness: Will you state that again?

Mr. Roberts: Read it, please.

(The pending question as above recorded was read by the reporter.)

Mr. Cohen: I object to that question on the ground that it is confusing.

By Mr. Roberts:

Q34. (Continuing) All I want to know is whether the band played those engagements. I asked you first if you solicited them.

[fol. 614] A34. Yes, he played them.

Q35. That is all I wanted to know.

A35. He played them after they were booked.

Q36. Now, when you solicited those engagements by Bill Carlsen and his orchestra, did you follow the practice of advising those various organizations of the special quality of music played by the orchestra?

Mr. Cohen: I object to questions which are designed to elicit answers on engagements other than those in issue in this case, on the ground that such evidence would be immaterial and irrelevant.

Mr. Roberts: Now you may answer.

The Witness: I am still to answer?

Mr. Roberts: Yes.

By The Witness:

A36. Yes, we describe an orchestra when we sell it.

By Mr. Roberts:

Q37. You tell them something about the style?

A37. Yes.

Mr. Roberts: Will you mark this photostat Plaintiff's Exhibit "L" for identification?

(Said photostat was accordingly marked Plaintiff's Ex-
[fol. 615] hibit "L" for identification, as directed.)

Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Plaintiff's Exhibit "L" for identification is a true and correct photostatic copy of the contract for the engagement of Bill Carlsen and his orchestra at the Crystal Ballroom in Dubuque, Iowa, dated July 12, 1941; that said exhibit shall be treated for all purposes the same as though it was the original contract of which it is a photostatic copy, and may be offered in evidence without further identification, subject only to the objection that it is irrelevant and immaterial.

Is that all right?

Mr. Wilson: Yes.

Mr. Cohen: Yes.

By Mr. Roberts:

Q38. I will hand you what the reporter has marked Plaintiff's Exhibit L (handing document to witness), and ask you to examine that document, and tell us what it is, if you know.

A38. It is a contract for Bill Carlsen and his Orchestra, to appear August 17, 1941, at Dubuque, Iowa, at the Crystal Ballroom.

[fol. 616] Q39. Do you find your signature on there anywhere?

A39. At the bottom of the page, at the righthand corner.

Q40. What can you tell us as to whether you booked that engagement? A40. I sold it.

Q41. What can you tell us, as to whether Bill Carlsen had a management contract with MCA at the time that this contract, Plaintiffs' Exhibit L was executed—or the contract of which Plaintiffs' Exhibit L is a photostatic copy, was executed?

Mr. Wilson: I will object: The contract would be the best evidence.

By The Witness:

A41. There was a management contract.

By Mr. Roberts:

Q42. Was that the same contract that was executed—I believe you said, some time in 1937, between Bill Carlsen and the Music Corporation of America?

Mr. Wilson: Objected to, for the same reason.

By The Witness:

A42. I am sure that it was.

By Mr. Roberts:

Q43. What can you tell us as to whether the side men [fol. 617] in Bill Carlsen's orchestra were parties to the management contract with Music Corporation of America?

Mr. Wilson: Objected to again, for the same reason.

By Mr. Roberts:

Q43. (Continuing) Did they sign it?

A43. No, the contract was signed by Carlsen and by the Music Corporation of America.

Q44. Handing you again Plaintiffs' Exhibit L, I will ask you if you recognize the contract of which that exhibit is a photostatic copy, as any particular form of contract?

A44. It is a Form "B" contract.

Q45. And by that, you mean the Form "B" contract that was prepared by the American Federation of Musicians?

Mr. Wilson: I object to that.

By The Witness:

A45. Yes.

By Mr. Roberts:

Q46. Do you recall when this form was first used by Music Corporation in booking bands?

A46. Oh, it was either in June or July of 1941; I don't remember the exact month or date.

Q47. What can you tell us as to whether the Crystal [fol. 618] Ballroom could have obtained the services of Bill Carlsen and his orchestra for the engagement on

August 17, 1941, through Music Corporation of America, through the use of any other form of contract than the form of which Plaintiffs' Exhibit L is a photostatic copy?

Mr. Cohen: I object to that question as being leading, and suggestive of an answer.

By the Witness:

A47. No.

By Mr. Roberts:

Q48. That is, they could not have obtained—

A48. No.

Q49. (Continuing)—the services of that orchestra for this engagement without the use of the form of contract of which Plaintiffs' Exhibit L is a photostatic copy?

A49. No.

Q50. And you mean, by your answer "No," that they could not have?

A50. They could not have.

Q51. Is that right?

A51. They could not.

Q52. And when you say "they", you mean the Crystal Ballroom at Dubuque, Iowa?

[fol. 619] A52. Yes.

Q53. What can you tell us, Mr. Breyley, as to whether the side men of Bill Carlsen's orchestra ever had a written power of attorney, or other instrument in writing, signed by them, on file with Music Corporation of America, on July 12, 1941, in which Music Corporation of America was authorized to book and contract engagements for them?

A53. To the best of my knewledge we did not have any power of attorney for any side men in Carlsen's band.

Q54. Well, in the normal course of business, if there was such a power of attorney you would know about it, wouldn't you? A54. Yes.

Q55. And that was because of the fact of your position with the Company? A55. That is right.

Q56. What can you tell us as to whether any individual side man of Bill Carlsen's orchestra ever had a conversation with you with reference to Music Corporation of America acting as his agent of booking to contract for the engagement described in the contract dated July 12, 1941, of which Plaintiffs' Exhibit L is a photostatic copy?

[fol. 620] A56. Well, I don't know of any discussion that I had with any of the members of the band at all.

Q57. Regarding that matter?

A57. That is right.

Q58. I will ask you again to examine Plaintiffs' Exhibit L and—

Mr. Wilson: Is it an exhibit yet, or just offered, or marked?

Mr. Roberts: Just marked.

By Mr. Roberts:

Q58. (Continuing)—and call your attention to some writing, as follows:

"Rec'd 125.00. 7/16."

And then some initials; whose initials are those, do you know?

A58. They are, "M. E."; I think they are the initials of the girl that was on the reception desk.

Q59. And what do those figures signify to you, if anything?

A59. It is a representation that we received a deposit from Roy Bartels in the amount of $125.00, for the Bill Carlsen date on August 17, 1941.

Q60. That is, the Music Corporation of America received it? A60. That is right.

[fol. 621] Q61. What was done with that $125.00, if you know?

A61. It was placed in the bank, under one of our accounts.

Q62. To whose account would that be credited?

A62. On our books it would be credited as a deposit for Bill Carlsen.

Q63. What can you tell us as to whether withdrawals were made from that account in payment of your commission for booking the engagement?

A63. We deducted our commissions, and deposited it.

Q64. Were any other expenses sometimes deducted from the account?

A64. Occasionally.

Q65. If any balance remained in that account, state to whom it was paid, if you know.

A65. To Bill Carlsen.

Q66. I have referred in some of my questions to the term "side men": Just so the record will be straight, will you tell us what that term means in the trade?

A66. A side man is a musician that plays in an orchestra.

Q67. You mean by that, that he is a member of the orchestra other than the leader?

[fol. 622] A67. That is right.

Mr. Roberts: I will now offer in evidence Plaintiffs' Exhibit L.

Mr. Cohen: No objection.

Mr. Wilson: No objection.

(Said document was accordingly received, marked Plaintiffs' Exhibit L, certified under the name and signature of the Notary and Commissioner, duly made a part of this deposition and returned herewith, the same being in words and figures as follows, to-wit:—)

Contract Blank

RECEIVED
CHICAGO OFFICE
MUSIC CORPORATION OF AMERICA
1941 JUL 10 AM 9:17 MCA

MUSIC CORPORATION OF AMERICA

16 Old Bond St., W. 1. LONDON Phone Regent 6508
745 Fifth Avenue NEW YORK Phone Wickersham 2-8900
430 N. Michigan Ave. CHICAGO Phone Delaware 1100
M C A Building BEVERLY HILLS Phone Bradshaw 23211
111 Sutter Street SAN FRANCISCO Phone Exbrook 8922
Chicago Commerce Bldg. CLEVELAND Phone Cherry 8010
Tower Petroleum Bldg. DALLAS Phone 2-1448

THIS CONTRACT for the personal services of musicians, made this 12th day of JULY, 1941

between the undersigned employer (hereinafter called the employer) and twelve (including leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of BILL CARLSEN, according to the following terms and conditions:

Place of employment: CRYSTAL BALLROOM DUBUQUE, IOWA

Date(s) of employment: AUGUST 17, 1941

Hours of employment:

Hours of employment

Price agreed upon $250 GUARANTEE WITH PRIVILEGE OF 60% OF THE GROSS RECEIPTS
(Terms and amount)

To be paid $125 DEPOSIT; BALANCE BEFORE 11 PM NIGHT OF ENGAGEMENT
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians Local in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer CRYSTAL BALLROM by Roy Bartels

Street Address P.O. BOX 371

City or State DUBUQUE, IOWA

Phone 6363

Accepted by Employer Roy Bartels

Accepted _____ (Orchestra Leader)

By MUSIC CORPORATION OF AMERICA
(Representatives of Employers)

FORM E

Plaintiffs' Exhibit "L" attached to Deposition

449

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
(Leader)			

[fol. 625] By Mr. Roberts:

Q68. What can you tell us, Mr. Breyley, as to whether Music Corporation of America ever had a booking agreement or management contract with Griff Williams?

A68. We had a management contract with Griff Williams.

Q69. Were you the employe of MCA who handled most of the bookings of engagements by his orchestra?

A69. Most of the out-of-town engagements in this territory.

Q70. You handled those? A70. Yes.

Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Plaintiffs' Exhibit M for identification is a true and correct photostatic copy of the contract for the engagement of Griff Williams and his Orchestra at the Crystal Ballroom at Dubuque, Iowa, dated July 26, 1941; that said exhibit shall be treated for all purposes the same as though it were the original contract of which it is a photostatic copy; and may be offered in evidence without further identification, subject only to the objection that it is irrele-
[fol. 626] vant and immaterial.

Is that all right?

Mr. Cohen: Yes.

Mr. Wilson: Yes.

(Said photostat was accordingly marked Plaintiffs' Exhibit M, as directed.)

By Mr. Roberts:

Q71. I will now hand you what the reporter has marked Plaintiffs' Exhibit M, and ask you if you recognize that as a photostatic copy of a contract for an engagement by Griff Williams and his orchestra at the Crystal Ballroom, Dubuque, Iowa, on September 1, 1941. (Handing document to witness.)

A71. I do.

Q72. What can you tell us as to whether your name or signature appears anywhere on the contract of which Plaintiffs' Exhibit M is a photostatic copy?

A72. It appears in the lower righthand corner.

Q73. What can you tell us as to whether you handled the booking of the engagement on September 1, 1941, of Griff Williams and his orchestra? A73. I sold it.

Q74. What can you tell us as to whether Griff Williams had a booking contract or a management contract [fol. 627] in effect on the date that the contract of which Plaintiffs' Exhibit M is a photostatic copy, was made?

A74. He had one.

Mr. Roberts: Will you mark this Plaintiffs' Exhibit N?

(Said document was accordingly marked Plaintiffs' Exhibit N, as directed.)

By Mr. Roberts:

Q75. I will now hand you what the reporter has marked as Plaintiffs' Exhibit N, (handing document to witness) and ask you to state what that document is, if you know.

A75. That is the management contract between the Music Corporation of America and Griff Williams.

Q76. Bearing what date?

A76. The 14th of February, 1934.

Q77. What can you tell us as to whether Griff Williams' genuine signature appears on that document?

A77. I am sure that that is Griff Williams' signature.

Q78. And whose signature appears on there under the heading, "Music Corporation of America"?

A78. Earl Bailey.

[fol. 628] Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Plaintiffs' Exhibit N is a true and correct photostatic copy of a contract dated February 14, 1934, between Griff Williams, as first party, and Music Corporation of America, as second party;

It is further stipulated and agreed that said exhibit shall be treated for all purposes the same as though it were the original contract of which it is a photostatic copy, and may

be offered in evidence without further identification, subject only to the objection that it is irrelevant and immaterial.

Is that satisfactory?

Mr. Wilson: I would like to re-word the last part: Subject to all objections, except as to its authenticity?

Is that all right?

Mr. Roberts: Well, of not being the original.

Mr. Wilson: Yes. I mean, we don't want to limit ourselves on objections.

Mr. Roberts: That is right; but I don't want any objection as to the fact that we do not have the original.

[fol. 629] Mr. Wilson: That is all right. Let me state it that way, that it will not be subject to objection on the basis that it is not—

Mr. Roberts: The original document.

Mr. Wilson: (Continuing)—the original document.

Mr. Roberts: Of which it is a photostatic copy. Is that right?

Mr. Wilson: Yes.

By Mr. Roberts:

Q79. What can you tell us, Mr. Breyley, as to whether the contract of which Plaintiffs' Exhibit N is a photostatic copy, was still in effect on July 26, 1941?

A79. It was.

Q80. Was it also in effect on September 1st, 1941?

A80. It was.

Q81. And when I say "it", of course you understand that I am referring to that contract of which Plaintiffs' Exhibit N is a photostatic copy.

Mr. Roberts: Plaintiffs offer in evidence, Plaintiffs' Exhibit M, and also offer in evidence Plaintiffs' Exhibit N.

Mr. Wilson: We object to Plaintiffs' Exhibit N, as im-
[fol. 630] material and irrelevant.

(Said documents were accordingly received, marked respectively Plaintiffs' Exhibits M and N, each being respectively certified under the name and signature of the Notary and Commissioner, and duly made a part of this deposition and returned herewith, the same being respectively in words and figures as follows, to-wit:—)

Contract Blank

RECEIVED
CHICAGO OFFICE
MUSIC CORPORATION
OF AMERICA

MUSIC CORPORATION OF AMERICA

1941 JUL 21 PM 1:32

16 Old Bond St., W. 1 LONDON Phone Regent 6505 | 745 Fifth Avenue NEW YORK Phone Wickersham 2-8900 | 430 N. Michigan Ave CHICAGO Phone Delaware 1100 | M.C.A. Building BEVERLY HILLS Phone Bradshaw 2121 | 111 Sutter Street SAN FRANCISCO Phone Exbrook 9922 | Union Commerce Bldg. CLEVELAND Phone Cherry 637 | Mer. Petroleum B'd'g. DALLAS Phone 2-1468

THIS CONTRACT for the personal services of musicians, made this 26 day of JULY 1941

between the undersigned employer (hereinafter called the employer) and 13 (including leader) musicians (hereinafter called employees) represented by the undersigned representative

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the

leadership of GLEN MILLER, according to the following terms and conditions

Place of employment CRYSTAL BALLROOM, [illegible], IOWA

Date(s) of employment SEPTEMBER 1, 1941

Hours of employment 9 Pill to 1 A.M.

Price agreed upon $350 GUARANTEE WITH A 60 P[illegible] O[illegible] T[illegible] G[illegible] RECEIPTS
(Terms and amount)

To be paid $125 DEPOSIT, BALANCE BY 11 PM NIGHT O[illegible] E[illegible]NT
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer CRYSTAL BALLROOM
by ROY BARTELS

Street Address 1545 AUBURN ST.

City or State DUBUQUE, IOWA

Phone

Accepted by Employer Roy Bartels

Accepted

(Orchestra Leader)

By [illegible] FEDERATION OF MUSICIANS

FORM B
Printed in U. S. A.

Plaintiffs' Exhibit "M" attached to Deposition.

Plaintiffs' Exhibit "M" for Ident.

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
_____ (Leader)			$

Agreement entered into between GRIFF WILLIAMS first party, and MUSIC CORPORATION OF AMERICA, a corporation, second party.

1. Whereas first party is a musician and orchestra leader whose services as such are extraordinary and unique and second party is engaged in the business of representing musicians and orchestras, arranging and booking orchestras and musical entertainment, and has a large following and international reputation and an established, recognized business and good will, and by virtue thereof, first party recognizes that an association with second party, will enhance the commercial value and financial returns of first party, wherefore first party desires to appoint second party as exclusive agent and representative to sell and market the services of first party and his orchestra or both,

NOW, THEREFORE, in consideration of the premises, of One Dollar ($1.00) in hand paid to first party and of the services heretofore, now or hereafter rendered by second party in soliciting, arranging and/or booking engagements for first party or his orchestra, or both, first party hereby appoints second party as the sole and exclusive agent and representative for and on behalf of first party and/or his orchestra as now constituted composed of 11 musicians, (subject to change in number and personnel by mutual agreement only) to sell and market the services of first party or said orchestra, or both, and/or to book or arrange performances or engagements in any parts of the world for any and all services of first party as musician, actor, announcer, performer, entertainer, musical director, and/or in any other capacity which first party may fill, individually or in conjunction with any person, firm or corporation, any orchestra or organization, any recording company, any talking picture company, any broadcasting company or in conjunction with any other phase of entertainment, whether now conceived or not, or .....

.....

.....

engagement

otherwise, beginning approximately at end of Edgewater Beach / and continuing until such time as second party shall have received as compensation from first party a total sum of

One Hundred Thousand ($100,000) Dollars,

pursuant to paragraph 10 hereof, unless sooner terminated as hereinafter provided. The orchestra of first party shall be known as GRIFF WILLIAMS AND HIS ORCHESTRA

.....

.....

and first party agrees to appear, perform and play in person during all engagements or bookings of first party or his orchestra or both, pursuant hereto.

During the term hereof, first party agrees that he will not play, perform, act or render any services either as musician, actor, performer, or entertainer or in any other capacity for entertainment purposes, whether now conceived or not, either individually or in conjunction with any other person, firm or corporation or with the members of his orchestra or with any other orchestra or theatrical company or any moving picture company or for any broadcasting or radio company or station, or for any recording or reproducing company or otherwise, except by and with the written consent of second party first had and obtained, unless it be on an engagement obtained by second party.

Plaintiffs' Exhibit "N" attached to Deposition.

2. Second party accepts said appointment and agrees to devote such time as it shall determine and furnish the services of its organization in such manner as it shall deem advisable, to the end that it may best market the services of and solicit engagements for first party or said orchestra or both.

3. First party hereby represents that he and all members of his orchestra are and will continue to be members in good standing of the American Federation of Musicians and that the constitution, rules, by-laws and regulations of the said Federation will be complied with, first party hereby assuming all responsibility for non-compliance therewith. First party also agrees that he will at all times pay the musicians who are members of his orchestra, a sum not less than the Federation scale in force and effect at each place where any engagement shall be played by first party and his orchestra, it being understood that payments shall be made in periods not more than one week apart. Nothing in this contract shall ever be so construed as to interfere with any obligation which first party may have to the American Federation of Musicians.

4. First party agrees that any and all leads, communications, requests or solicitations for engagements and/or performances received by first party, either for his services individually or in conjunction with his orchestra, or with any other orchestra or company, or otherwise embraced within the provisions of this agreement, shall promptly be referred by first party to second party.

5. In the event that first party in violation of Paragraph 1 hereof, shall attempt to or shall appear or perform, either as musician, actor, performer or entertainer, or in any other capacity for entertainment purposes, whether now conceived or not, either individually or in conjunction with any other person, firm or corporation, or with the members of his orchestra or with any other orchestra or theatrical company or with a moving picture company or for a broadcasting or radio company or station, or for a recording or reproducing company or otherwise, then second party shall have the right to enjoin and restrain such appearance or performance of first party by injunction issued from any court of competent jurisdiction, first party hereby agreeing that such injunction shall issue and further agreeing that any and all services rendered or to be rendered by first party are extraordinary and unique and cannot be replaced or duplicated, and that the damages of second party in the event of the violation by first party of paragraph 1 hereof, cannot be ascertained and will be irreparable.

6. First party agrees further that for and during the term of this contract, first party will not allow his name or that of his orchestra to be advertised by any management, or by any person, firm or corporation (other than second party) except by and with the written consent of second party first had and obtained. In the event first party shall violate the provisions of this paragraph, then second party shall have the right to restrain and enjoin such violation by injunction issued from any court of competent jurisdiction.

7. While second party does not guarantee bookings or engagements hereunder, second party does agree to use its best efforts and the services of its comprehensive organization to solicit bookings and engagements for first party, or said orchestra, or both. All engagements obtained by second party may be contracted for in the name of first party, and second party shall in no manner be liable or responsible to first party in the event that during the term hereof first party, or said orchestra, or both, shall not obtain, perform or play any engagements. Second party shall in no manner be liable or responsible to first party, or said orchestra, or both, for the performance or non-performance of booking contracts or engagements obtained for first party or entered into by second party on behalf of or in the name of first party and second party shall in no manner be liable to first party or said orchestra, or both, for any payments or amounts due or to become due to first party, or said orchestra or both, for services rendered pursuant to such bookings or engagements. The commission provided for in paragraph 10 hereof, to be paid to second party, shall be based upon the compensation actually paid to or received by first party, or his orchestra, or both, upon all engagements of first party or his orchestra or both, during the term hereof

8. For and in consideration of engagements played by first party or said orchestra or both pursuant hereto, first party agrees that first party or said orchestra or both, will not accept or play engagements at any place for a period of eighteen (18) months from the last date when first party and or his orchestra shall have performed an engagement or booking at such place pursuant to this contract, except and unless such engagement shall be played pursuant to a booking by second party or with the written approval of second party first had and obtained.

9. In the event that for a "period" in excess of 29 cumulative days during any fiscal year hereof, first party or his orchestra shall not perform or play any engagement or booking of any kind whatever, and first party shall not have been offered any engagement or booking to be performed during said "period" either by first party or his orchestra, or both, and in the event further that the total compensation for the services of first party and his orchestra upon all engagements performed or played from the first engagement hereunder to the end of the last engagement hereunder, shall be less than the average amount per day mentioned in paragraph 11 hereof, computed for the period of time from the first engagement hereunder to the expiration of said number of cumulative days, then this contract may thereafter be terminated by first party by virtue thereof, provided ten days previous notice in writing be delivered to and received by second party.

Plaintiffs' Exhibit "N" attached

... delivered to and received by second party.

10. So long as this contract shall be in effect, and until the conclusion of any engagement entered into during the term of this contract, first party agrees to pay to second party for the services of second party hereunder, the following compensation, to-wit:

20 % on all engagements for a period of less than seven days at one place;

10 % on all engagements performed at one place for seven days or more, where the gross weekly sum paid for the services of first party and his orchestra, shall be $ 2000.00 or less per week, which commission shall be increased at the rate of 1% for each additional $100.00 per week in excess of said sum per week paid for the services of first party and his orchestra, and said total increased commission shall be computed upon the gross weekly sums paid for the services of first party and his orchestra, provided, however, that said total increased commission shall in no event be in excess of 15 %.

The said respective commissions shall be calculated and based upon the moneys paid for the services of first party and his orchestra and for all services of first party alone, upon each class and kind of engagement as aforesaid performed or played by first party or said orchestra or both. The said percentages shall be average maximum percentages to be figured and based upon all engagements respectively of the class and kind set forth above, played by first

...ched to Deposition.

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party or said orchestra or both, during each fiscal year hereof. First party agrees to pay to second party weekly, such part of the difference between the Federation scale and all sums received by first party for the services of first party or said orchestra or both for engagements played, as together with previous payments made by first party to second party, will attain or equal (as near as possible) the said respective maximum average percentages due second party for all engagements played up to such time, and accordingly the percentages thus paid by first party to second party may, during certain weeks, be less and during other weeks be more, than the respective maximum average percentages for the kind and class of engagements played in accordance with the above provision. In addition to the commission due second party hereunder, first party also agrees to pay all commissions or charges which may be required to be paid as compensation or commission to any theatrical or publicity agent or agent other than second party in connection with any engagements of first party or his orchestra or both, which such commissions or charges may be deducted from the compensation to which first party may be entitled to receive upon engagements played. It is understood, however, that out of, and from all moneys received by first party upon engagements played hereunder, first party shall always retain a sum not less than the Federation scale in force and effect at the places where such engagements are played for which moneys are so received by first party, in payment for his own services and for all members of his orchestra.

9. First party hereby authorizes second party to execute any and all contracts for and on behalf and in the name of first party for the services of first party or his orchestra, or both, for engagements or bookings pursuant hereto, at such place or places, for such time and compensation as second party shall procure, provided further that all such bookings or engagements shall comply with the rules and regulations of the American Federation of Musicians, and first party agrees to fulfill and perform any and all such contracts so entered into on behalf of first party by second party. [redacted]

11. Subject to the provisions of paragraph 7 hereof, it is understood that upon the termination of this contract, first party and said orchestra shall together have received an average of not less than $ 150.00 per day upon engagements actually played for which compensation was received and that the total moneys so received shall in no event be less than the sum of the Federation scales for all engagements actually played for which compensation was received.

12. Upon request of first party, second party agrees to use its best efforts to assist first party in procuring musicians to constitute the orchestra of first party. It is agreed, however, that any and all musicians constituting the orchestra of first party, even though second party shall assist in procuring any of such musicians, shall at all times be deemed to be employees of first party only, and no such musicians constituting the orchestra of first party shall be deemed employees of second party. First party hereby agrees that second party may employ musicians for first party upon request of first party and second party agrees to advise musicians so employed that they are engaged for and on behalf of first party only.

13. First party agrees to advertise and help popularize any and all musical compositions and selections as second party shall request, the same to be done by the frequent playing of such compositions and selections upon all engagements of first party and or his orchestra or in such other manner as second party shall determine. Any and all expenses incurred by first party in connection with such advertising shall be paid for by second party, provided first party shall in writing have been authorized to incur the same. Second party shall have the right to use the name of first party either individually or with his orchestra in all advertising matter of second party; and upon request of second party, first party agrees to sign any and all testimonials and endorsements. Second party shall have the right to use the name and photographs of, and any other publicity matter relating to first party and/or his orchestra, in conjunction with publicity or advertising matter of the MUSIC COLLEGE OF AMERICA, an institution which may now or hereafter be engaged in the music business, and of any other corporation or business in which second party may have any interest, directly or indirectly.

14. So long as this contract shall be in force and not terminated as herein provided, first party agrees that he will not accept any engagements for himself or his orchestra or both, or for any other orchestra, nor will first party engage in a business similar to the business of second party, except by and with the written approval and consent of second party first had and obtained, and in no event shall any engagement be accepted or played by first party or his orchestra or both, at a sum less than the Federation scale in force and effect at the place or places where such engagements are to be played. Second party agrees never to procure or contract for any engagement on behalf of first party in violation of the rules and regulations of the American Federation of Musicians or any local union thereof.

15. In the event second party shall obtain bookings or engagements for first party pursuant to the provisions hereof and in the event thereafter, first party shall refuse to perform any such engagements or shall be unable so to do by virtue or because of illness, desire for a vacation or rest, then for the purposes of paragraph 9 hereof, it shall be deemed first party had played or performed and that second party had obtained an engagement so agreed upon as aforesaid, and the full time of such engagement so obtained, shall be counted and computed as if first party had actually performed or played such engagement, in determining whether or not there has been a lapse of the requisite number of cumulative days within any fiscal year under paragraph 9 hereof.

16. In the event this contract be terminated by first party pursuant to paragraph 9 hereof, and in the event thereafter a booking arranged and obtained by second party is accepted by first party or his orchestra, or both, then the acceptance of such subsequent engagement or booking shall automatically reinstate this contract with all of its provisions including Paragraph 9 thereof, for the balance of the original term hereof.

Plaintiffs' Exhibit "N" attached to Deposition.

17. In the event first party shall not receive or shall be unable to collect any moneys due for engagements or bookings performed or played by first party, or his orchestra, or both, and as a result thereof second party shall not receive the compensation thereon to which it is entitled pursuant hereto, then first party agrees to file any and all necessary claims therefor with the American Federation of Musicians and also to take any and all other legal action necessary to collect the same, and upon obtaining the amount due, or any part thereof, first party agrees forthwith to pay unto second party, the compensation thereon to which second party is entitled pursuant hereto, which compensation may be deducted from any sums thereafter becoming due to first party upon any engagements or bookings played by first party or his orchestra or both.

18. First party agrees for himself and the members of his orchestra that after the termination of this agreement by lapse of time or otherwise, neither he nor his orchestra, or its members, will copy, simulate or use any of the advertising and/or publicity material at any time prepared, furnished and/or used by first and/or second party, in connection with engagements or bookings of first party or his orchestra, or both, pursuant hereto.

19. In connection with soliciting and/or the performance of engagements pursuant hereto, first party and his orchestra shall be known and advertised under the name of .....

.....

or some other name as second party shall in its sole discretion determine. Neither the first party nor his orchestra shall have any right, title or interest in and to said specific name or any other name hereafter adopted, by virtue of the use of the same pursuant hereto. First party acknowledges that said specific name and any other names used for first party and his orchestra pursuant hereto, is and are the property of second party, permission being hereby given to first party to use the same only so long as second party desires. Upon the termination of this agreement, whether by lapse of time or otherwise, then and thereafter, neither first party, his orchestra or its members, shall have any right to use said specific name or any other name hereafter adopted, for any purpose whatever, but second party shall have the sole right to use such name or names in conjunction with any other orchestra or orchestras or may allow other persons to use said name or names in conjunction with orchestras of such persons. Second party shall have the right by injunction to restrain a violation of the provisions of this paragraph.

20. The invalidity or illegality of any paragraph or clause in this contract contained, shall in no way affect the validity or legality of all other paragraphs or clauses hereof, which can be given effect without such invalid or illegal part; and all such other clauses, paragraphs and agreements herein contained, shall be binding upon the parties hereto with the same full force and effect as though such invalid or illegal portion, paragraph or clause, were not contained in this agreement.

No waiver or modification by first or second party of the terms of this agreement, whether in one or more instances, shall be deemed to permanently or thereafter modify or waive the terms of this agreement, except in the specific instance of any express waiver or modification by the mutual agreement of the parties.

This contract shall inure to the benefit of second party, its successors and assigns, and shall be construed and enforced in accordance with the laws of the State of Illinois. This agreement cancels and supersedes all previous agreements.

It is understood that the words "engagement", "performance", "playing", "services" and all similar words in this agreement contained, shall refer to and include all services which may be performed by first party, his orchestra or both, including the services of first party as leader and/or director of any orchestra or orchestras or as an actual performer of any musical instrument, individually or in conjunction with or as part of any orchestra, or as actor, announcer, performer, entertainer and/or in any other capacity which first party may fill, and including all personal appearances of first party in any cafe, dance hall or place of entertainment, all appearances of first party before the microphone for broadcasting and/or television, all appearances of first party for moving picture purposes, all services of first party in making recordings and records, all appearances of first party for all and any other purposes of entertainment, whether now conceived or not, and all other appearances, even if not for entertainment purposes, when compensation in any form shall be paid. The word "orchestra" whenever used herein shall be deemed to include the orchestra of first party with the number and personnel as constituted, changed or reorganized from time to time. Each period of twelve months beginning with the first engagement hereunder, shall be deemed to be a "fiscal year" as the said term "fiscal year" is used herein.

Second party shall have no right to cancel or terminate any contract or engagement procured by second party for first party without written consent of first party.

The portions of this contract which have been struck out, crossed out or added are so done by mutual agreement of the parties.

IN WITNESS WHEREOF first party has hereunto affixed his hand and seal and second party has caused this agreement to be signed by its duly authorized officer this 14 day of February A. D. 19 34

Jiff Williams (SEAL)
(First Party)

(SEAL)
(First Party)

MUSIC CORPORATION OF AMERICA
(Second Party)

By Earl F. Bailey

Copyright 1932 by Music Corporation of America

Plaintiffs' Exhibit "N" attached to Deposition.

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[fol. 637] By Mr. Roberts:

Q82. Calling your attention again to Plaintiffs' Exhibit M, do you find from an examination of Plaintiffs' Exhibit M that there appears some handwritten entries as follows:

"Recd 125.00 7/3",

and then some initials; and whose are they?

A82. The girl on the reception desk.

Q83. What are those initials?

A83. I think they are, "M.E."

Q84. What does that entry on the contract signify to you, if anything?

A84. The receipt of a deposit of $125.00 from Roy Bartels in Dubuque.

Q85. What can you tell us, Mr. Breyley, as to whether the side men in Griff Williams' orchestra ever had a booking contract with MCA during the year 1941 on which their signatures appear?

A85. There was none to my knowledge.

Q86. And you would have known of it in the ordinary course of business, wouldn't you?

A86. Yes.

Q87. By reason of your position with MCA?

A87. Yes.

Q88. What can you tell us as to whether any individual [fol. 638] side man in Griff Williams' orchestra ever had a written power of attorney on file with Music Corporation of America during the year 1941, authorizing Music Corporation of America to book and contract engagements for him?

A88. There weren't any.

Q89. There were no such contracts, or no such written powers of attorney?

A89. No.

Q90. By any side men?

A90. No.

Q91. Was there any other instrument in writing signed by the side men, on file with MCA during that year, authorizing it to act for them in booking engagements?

A91. No.

Q92. You mean by that that there wasn't any such instrument?

A92. There wasn't any.

Q93. What can you tell us as to whether any individual side man in Griff Williams' orchestra ever had a conversation with you about MCA acting for him in booking engagements?

A93. I do not recall of any.

Q94. You do not recall of any conversations?

[fol. 639] A94. No.

Q95. Between you and any side man of Griff Williams' orchestra?

A95. No.

Q96. With reference to Music Corporation of America booking engagements for him?

A96. No.

Q97. Is that right?

A97. There wasn't any discussion with the musicians about any bookings.

Q98. And when you say "musicians", you mean the side men in Griff Williams' orchestra?

A98. That is right.

Q99. Mr. Breyley, you appeared here for the taking of this deposition, in response to a subpoena?

A99. Yes.

Mr. Roberts: That is all.

Cross-Examination.

By Mr. Cohen:

Q100. Mr. Breyley, this contract between the Music Corporation of America and Griff Williams was executed in 1934; is that correct? (Indicating Plaintiffs' Exhibit N.)

A100. That is right.

[fol. 640] Q101. Now, were any modifications or alterations of that contract executed subsequent to that date, between Griff Williams and MCA?

A101. You mean, since 1934?

Q102. Yes.

A102. Yes.

Q103. When were they?

A103. There was a new contract—a new management contract made in September, 1941.

Q104. Can you give us the exact date?

A104. No, I cannot give you the exact date.

Q105. Were there modifications prior to September, 1941?

A105. I don't think I can tell you accurately.

Q106. You don't know, then, whether this Plaintiffs' Exhibit N was in force in the form in which it is here presented, in July of 1941, or September of 1941; is that correct?

The Witness: Would you repeat that last part again?

(The pending question as above recorded was read by the reporter.)

Mr. Roberts: That is objected to as asking for an answer contrary to the witness own testimony.

[fol. 641] Mr. Cohen: This is cross-examination.

By The Witness:

A106. Well, I am sure that we were booking him under the terms of that contract (indicating Plaintiffs' Exhibit N).

By Mr. Cohen:

Q107. Well, you are unable to state—isn't this correct—whether or not there were any modifications of Plaintiffs' Exhibit N, between 1934 and July, 1941; is that true?

A107. Is it possible to ask a question off the record, or answer a question that is off the record?

Q108. Well, can you answer my question without?

A108. To the best of my knowledge that is the contract that was in effect, and if there were any modifications to it, they would have been attached to the contract. And that is why I am asking if I can ask you one thing, then I can tell you what I am trying to tell you.

Mr. Cohen: O. K.

(Here ensued a brief colloquy off the record, omitted as directed by counsel.)

Mr. Cohen: Back on the record:

By Mr. Cohen:

Q109. Was this Plaintiffs' Exhibit N complied with [fol. 642] by both parties during the existence of the agreement?

A109. To the best of my knowledge, it was.

Q110. Do you know whether Griff Williams had the same aggregation of musicians during the entire period from 1934 to 1941?

A110. No, I don't know.

Q111. You don't know whether he did or not?

A111. No.

Q112. Is it possible, then, that he may have changed the side men in his orchestra from time to time?

Mr. Roberts: Objected to as calling for a speculative answer, the witness already having shown by his testimony that it would just be a guess.

By Mr. Cohen:

Q112. (Continuing.) Well, if he had changed the side men in his orchestra during this period an alteration of this contract would have been necessary; isn't that true?

Mr. Roberts: Objected to, as argumentative, calling for the opinion and conclusion of the witness.

Mr. Cohen: You may answer that.

The Witness: Would you state your question again?

[fol. 643] (The pending question as above recorded was read by the reporter.)

By The Witness:

A112. No.

By Mr. Cohen:

Q113. Will you read the first page of Plaintiffs' Exhibit N (handing document to witness), the paragraph starting with,

"Now, Therefore,"

the part starting with,

"first party hereby appoints second party as the sole and exclusive agent and representative for and on behalf of first party"—

read that aloud, please.

A113. (The witness reading from Plaintiffs' Exhibit "N"):

"Now, Therefore, in consideration of the premises, and of One Dollar ($1.00) in hand paid to first party and of the services heretofore, now or hereafter rendered by second party in soliciting, arranging and or booking engagements for first party or his orchestra, or both, first party hereby

appoints second party as the sole and exclusive agent and [fol. 644] representative for and on behalf of first party and/or his orchestra as now constituted composed of 11 musicians, (subject to change in number and personnel by mutual agreement only)".

Q114. All right. Now, is it your understanding, then, that the contract does provide for a modification by mutual agreement when the components of Griff Williams' orchestra altered?

Mr. Roberts: Objected to, as calling for a conclusion and legal opinion of the witness, the witness not shown competent.

By The Witness:

A114. Trying to make a lawyer out of me! (Witness examines Plaintiffs' Exhibit N.) Well, I am still of the same opinion.

By Mr. Cohen:

Q115. Well, would it be correct, and fair to state that you think that this contract in this form was in effect in July, 1941, but that you are not sure?

A115. No, I would not say that.

Q116. Mr. Breyley, is it possible that powers of attorney may have been executed by the side men, in either Bill Carlsen's orchestra, or Griff Williams' orchestra, and deposited with Bill Carlsen, or Griff Williams, without your knowledge?

[fol. 645] A116. It is possible that they could be; it is not very probable that they were, without my knowledge.

Q117. Well, do you know everything that went on between the side men, in each of those orchestras, and the leader?

A117. No.

Q118. You don't know whether or not they ever discussed the fact that MCA was the booking agent for that orchestra, do you?

A118. No.

Mr. Cohen: That is all.

Mr. Wilson: I have no questions.

(End of deposition.)

Mr. Fuller (Commissioner): Mr. Witness, counsel have stipulated to waive the reading and signing of your deposition. Do you wish to waive the reading and signing of your deposition?

The Witness: Yes, I waive the reading and signing of my deposition.

The reading of his foregoing fully transcribed deposition, and the signing thereof by the said witness, James K. Breyley, were by stipulation by and between counsel for the parties, and by the witness, duly waived:

[fol. 646] ROY E. FULLER,
Notary Public, Cook County, Illinois.

My Commission expires June 7 A.D. 1947.

(Seal) Commissioner

[fol. 647] Mr. Roberts: Will you please administer the oath to Mr. Kayser?

And the said JOSEPH L. KAYSER, of lawful age, having been by me, the said Roy E. Fuller, as Notary Public and Commissioner, as aforesaid, first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, was examined upon oral interrogatories, and he did thereupon depose, testify, and say as follows, viz.:

Direct Examination.

By Mr. Roberts:

Q1. Will you give your name to the reporter?

A1. Do you want my initials? I usually go by the name of "Joe Kayser"—Joseph L. Kayser (spelling) K-a-y-s-e-r.

Q2. But you usually go by—

A2. Just "Joe Kayser".

Q3. Where do you live?

A3. 6431 North Claremont, Chicago.

Q4. You came here this morning in response to a subpoena?

A4. Yes, sir.

[fol. 648] Q5. Were you formerly employed by Frederick Bros. Music Corporation?

A5. I was.

Q6. Did they have an office in Chicago?
A6. Yes.
Q7. Were you employed in that office?
A7. Yes.
Q8. How long were you with that concern?
A8. Five years.
Q9. Can you give us approximate dates, that is, by years?
A9. May, 1939, to May 1st, 1944.
Q10. What business was Frederick Bros. Music Corporation engaged in during the period you were with them?
A10. Artists' representatives, booking of bands of acts.
Q11. What were you duties, in a general way?
A11. Executive booker.
Q12. You handled bookings, some of orchestras, and some of the others?
A12. Yes, of orchestras only.
Q13. Of orchestras only?
A13. Yes.
Q14. Now, during your employment with Frederick [fol. 649] Bros. did you become acquainted with the orchestras that that corporation booked?
A14. I did.
Q15. That is, you knew something about their history?
A15. I did.
Q16. And their quality of music?
A16. Yes.
Q17. Did you have occasion to solicit engagements from time to time for the orchestras?
A17. Yes.
Q18. And what types of establishments did you solicit for that purpose?
A18. Ballrooms, and hotels, and theatres; in fact, anyone using music.
Q19. Would that sometimes be college classes?
A19. Yes.
Q20. What about American Legion dances?
A20. As I say, anyone that was interested in having bands.
Q21. And civic organizations?
A21. That is right.

Q22. And in soliciting such engagements, did you follow the practice of telling the organization something about the orchestra?

[fol. 650] A22. Yes, we gave them selling points.

Q23. Something about its quality, and so forth, of its music?

A23. That is right.

Q24. What can you tell us, Mr. Kayser, as to whether Tiny Hill and his orchestra were one of the orchestras which you became familiar with in your work for Frederick Bros.?

A24. Well, that he was under management of Frederick Bros., and I handled a lot of his bookings—not all of them, most of them.

Q25. Can you tell us if you know when it was that Tiny Hill's orchestra was first organized?

A25. I don't know that; I know he came with Frederick Bros. because I came with them; he signed a management contract, I think it was in April of 1939—a five years management contract.

Q26. And you do know that that orchestra had been in existence sometime before that?

A26. Oh, yes.

Q27. Is that right?

A27. I do know that.

Q28. Would you say, two or three years?

A28. Yes.

Q29. Possibly longer?

[fol. 651] A29. Possibly, yes.

Q30. You say that that management contract was about five years in leng...? A30. Yes.

Q31. From some time in 1939?

A31. I think, as I say, April, 1939, to April, 1944.

Q32. Do you know whether the side men in Tiny Hill's orchestra were parties to that contract?

A32. To Frederick Bros. management contract?

Q33. Yes.

Mr. Cohen: I object to that question as calling for a legal conclusion. The witness can state who the signatories were, but the question of who is a party to the contract is a legal matter.

By the Witness:

A33. I don't, no. The side men are never a part of a management contract, the individuals.

By Mr. Roberts:

Q34. Their signatures did not appear on the contract?

A34. No. Now, I have never seen the management contract, all I know is that—

Q35. Customarily—

[fol. 652] Mr. Cohen: I object to the testimony, on the ground that the witness has not shown himself qualified in regard to this particular contract; and furthermore, on the ground that the contract will speak for itself—not the best evidence.

By Mr. Roberts:

Q36. You have, however, seen the type of management contract that was used generally, while you were there, have you not? A36. Yes.

Q37. And what was the custom as to the side men, whether their signatures appear there?

Mr. Cohen: I object to any contract, as immaterial and irrelevant to the issues in this case.

By the Witness:

A37. The side men's signatures are never on a management contract.

By Mr. Roberts:

Q38. You never saw one? A38. I never saw one.

Q39. That was on? A39. No, I did not.

[fol. 653] Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Plaintiffs' Exhibit "O" is a true and correct photostatic copy of the contract for the management of Tiny Hill and his orchestra, at the Crystal Ballroom, at Dubuque, Iowa, dated July 7, 1941; that said exhibit shall be treated for all purposes the same as though it were the original contract of which it is a photostatic copy, and may be offered in evidence without further identification, subject only to the objection that it is irrelevant and immaterial.

Is that all right?

Mr. Wilson: Yes.

Mr. Cohen: Yes.

Mr. Roberts: Will you mark this as Plaintiffs' Exhibit "O"?

(The document in question was accordingly marked Plaintiffs' Exhibit O for identification, as directed.)

By Mr. Roberts:

Q40. I will hand you what the reporter has marked, Plaintiffs' Exhibit "O", and ask you if you recognize that contract, of which the exhibit is a photostatic copy. (Hand-
[fol. 654] ing document to witness.)

A40. I do.

Q41. That is a contract for an engagement by Tiny Hill and his orchestra on September 28, 1941, at the Crystal Ballroom at Dubuque, Iowa?

A41. It is.

Q42. Does your signature appear any place on the contract of which Plaintiffs' Exhibit O is a photostatic copy?

A42. Yes, in the righthand corner; also in the receipt of deposit.

Q43. The receipt of deposit appears in the words, "$125.00 deposit received. Joe Kayser",

is that right?

A43. That is right.

Q44. What can you tell us as to whether you booked that engagement? A44. I did.

Q45. Do you recognize the form of contract of which Plaintiffs' Exhibit O is a photostatic copy, as any particular form? A45. Form "B".

Q46. That is the Form "B" of the American Federation of Musicians?

A46. That is the Form "B" of the American Federa-
[fol. 655] tion of Musicians.

Q47. What can you tell us, Mr. Kayser, as to whether the Crystal Ballroom at Dubuque, Iowa, could have obtained the services of Tiny Hill and his orchestra for September 28, 1941, through Frederick Bros., through the use of any other form of contract?

A47. They could not.

Q48. Going back to the recital appearing thereon, "$125.00 deposit received",

state what happened to that, if you know, so far as Frederick Bros. was concerned?

A48. They had an escrow deposit account in the bank for deposits.

Q49. And that money would be put in that account?

A49. That money would be put in that account, and on the books Tiny Hill would be given credit for $125.00 received in Dubuque, Iowa, for that particular date.

Q50. And then would some charges be made against that account on the books, for commission?

A50. Commission would be deducted.

Q51. And some expense, possibly?

A51. Possibly.

Q52. If any balance remained, to whom was it paid?

[fol. 656] A52. Tiny Hill.

Q53. What can you tell us as to whether any individual side man of Tiny Hill's orchestra ever gave you a written power of attorney, or other instrument in writing, signed by him, authorizing you to book and contract an engagement for him? A53. No, no side man.

Q54. Ever gave you such a power of attorney?

A54. No.

Q55. Nor other instrument in writing? A55. No.

Q56. Did you ever have an oral conversation with any side man of Tiny Hill's orchestra, with reference to your booking and contracting engagements for him?

A56. No.

Q57. That is, you didn't have any conversation with any side man? A57. No.

Q58. With reference to that matter?

A58. I did not; no, sir.

Q59. What can you tell us as to whether any of the side men of Tiny Hill's orchestra ever signed and filed with Frederick Bros. Corporation, a written power of attorney, or instrument in writing, authorizing Frederick Bros. to book and contract engagements for them?

[fol. 657] A59. I don't know of any.

Q60. You don't know of any? A60. No.

Q61. Normally, such a power of attorney would come to your attention, wouldn't it? A61. Yes.

Q62. In the position you occupied with the company?
A62. That is right.

Mr. Roberts: I will offer in evidence Plaintiffs' Exhibit "O".

No objection to that, I take it?

Mr. Wilson: No.

Mr. Cohen: No.

(Said document was accordingly received, marked Plaintiffs' Exhibit "O", certified under the name and signature of the Notary and Commissioner, duly made a part of this deposition and returned herewith, the same being in words and figures as follows, to-wit:—)

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Contract Blank

FREDERICK BROS. MUSIC CORPORATION

520 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS

THIS CONTRACT for the personal services of musicians, made this SEVENTH day of JULY 194 1

between the undersigned employer (hereinafter called the employer) and Eleven (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the persons' services of the employees as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of TINY HILL according to the following terms and conditions:

Place of employment CRYSTALL BALLROOM, DUBUQUE, IOWA

leadership of TINY HILL, according to the following terms and conditions

Place of employment CRYSTALL BALLROOM, DUBUQUE, IOWA

Date(s) of employment ~~September 28, 1941~~ $125 deposit received

Hours of employment 9 to 1

Price agreed upon $ ~~250.00 - privilege 60%~~ (Terms and amount)

To be paid Deposit required $125 - balance payable September 28, 1941
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer ROY BARTEL

Street Address CRYSTALL BALLROOM

City or State DUBUQUE, IOWA

Phone

Accepted by Employer Roy Bartel

Accepted Leroy Holl
(Orchestra Leader)

By
(Representative of Employer)

FORM B
(Printed in U.S.A.)

Plaintiffs' Exhibit "O" attached to Deposition.

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Tiny Hill (Leader)	89	325-14-4584	$
Melvin Mountjoy	89	325-14-4582	
F. C. Patterson	20	521-05-7342	
R. V. Schreier	798	325-14-4577	
Robert Arader	798	332-10-7111	
Dermit Coffeen	798	325-14-4578	
Norman Maxwell	183	345-03-9515	
Ralph Richards	20	523-07-0030	
Robert Walter	26	325-14-5950	
Lloyd Mc Cann	25	420-07-9505	
Russ Phillips	200	437-10-5215	
Bob Freeman	Vocalist	260-07-7566	

Plaintiffs' Exhibit "C" attached to Deposition.

[fol. 660] By Mr. Roberts:

Q63. What can you tell us, Mr. Kayser, as to whether Buddy Fisher and his orchestra was another orchestra with which you became familiar while you were with Frederick Bros. Corporation?

A63. I handled some of the bookings of that orchestra.

Q64. Do you know approximately when it was that Buddy Fisher's orchestra was organized?

A64. No, I do not.

Q65. Was it organized before you came to Frederick Bros.?

A65. Well, that particular orchestra?

Q66. Yes.

A66. I don't know—these leaders have orchestras, and they disorganize, and they organize again—I don't know.

Q67. You don't know as to this one?

Mr. Wilson: I move to strike the voluntary statement.

Mr. Roberts: I will agree that it may go out of the record.

Mr. Cohen: I don't agree!

Mr. Roberts: I will agree with counsel for the intervener, that it may go out of the record.

[fol. 661] Mr. Cohen: I won't agree; I want it to stay in the record.

Mr. Roberts: Will you read his answer back?

(The record as above recorded was read by the reporter.)

Mr. Roberts: I move to strike that part of the witness' answer, beginning with, "These leaders", as a volunteer statement of the witness not in response to the question asked.

Stipulation.

Mr. Roberts: It is hereby stipulated and agreed that Exhibit "P" is a true and correct photostatic copy of the contract for the engagement of Buddy Fisher and his orchestra, at the Crystal Ballroom, at Dubuque, Iowa, dated November 6, 1941; that said exhibit shall be treated for all

purposes the same as though it were the original contract of which it is a photostatic copy, and may be offered in evidence without further identification, subject only to the objection that it is irrelevant and immaterial.

[fol. 662] Is that all right?

Mr. Cohen: Yes.

Mr. Wilson: Yes.

Mr. Roberts: Will you mark this please as Exhibit P?

(Said document was accordingly marked Plaintiffs' Exhibit P for identification, as directed.)

By Mr. Roberts:

Q68. I will hand you what the reporter has marked as Plaintiffs' Exhibit P, and ask you if you are familiar with the contract of which the exhibit is a photostatic copy? (Handing document to the witness.)

A68. I am.

Q69. Is that a contract for engagement by Buddy Fisher and his orchestra at the Crystal Ballroom at Dubuque, Iowa, on November 23, 1941? A69. It is.

Q70. Does your signature appear any place on that contract? A70. In the righthand corner.

Q71. Also, do you find any other entries in your handwriting?

A71. In the receipt of the deposit.

[fol. 663] Q72. Of $50.00?

A72. Yes.

Q73. The date of that contract is November 6, 1941?

A73. That is right.

Q74. Do you know how long it was prior to that that Buddy Fisher's orchestra was in existence?

A74. Previous to this?

Q75. Yes, previous to that date?

A75. I do not, no.

Q76. Would you say, a year?

Mr. Cohen: The witness has answered that he didn't know; I think further questions are argumentative.

By Mr. Roberts:

Q77. Was it organized for this particular engagement?

A77. It was.

Q78. Answer the question: Was it just organized for this one engagement?

A78. Oh, no; it was organized previous to that engagement.

Q79. He had played other engagements before this; you know that, don't you?

A79. Yes.

Q80. And this $50, was that handled in the same man-
[fol. 664] ner as the deposit on Tiny Hill's contract?

A80. It was.

Q81. Put in an escrow account in the bank, and then credited to his account on the books of the corporation?

A81. Yes.

Q82. And the commissions and expense due the company were deducted?

A82. That is right.

Q83. And any balance was paid to Buddy Fisher?

A83. That is right.

Q84. You mentioned that Buddy Fisher and his orchestra played other engagements; can you tell us what type of establishments his orchestra played at?

A84. Hotel engagements, and one-night engagements.

Q85. That would be one-night engagements or what?

A85. Ballrooms or college parties.

Q86. And clubs?

A86. Yes.

Q87. And lodges?

A87. Yes.

Q88. When you were booking engagements by Buddy Fisher and his orchestra, did you follow the practice of telling the respective music users something about the
[fol. 665] orchestra?

A88. Gave them a sales talk, that is right.

Q89. And something about its special quality of music?

A89. That is right.

Q90. You followed that practice during 1941, I take it?

A90. That is right.

Q91. What can you tell us as to whether any of the side men of Buddy Fisher's orchestra ever gave you a power of attorney signed by him authorizing you to book and contract engagements for him?

A91. They never did, the side men.

Q92. None of the side men ever gave you such a power of attorney?

A92. No.

Q93. Or any instrument in writing; isn't that right?

A93. That is right.

Q94. Did you ever have a conversation with any of the side men with reference to your acting for them in booking engagements?

A94. I did not.

Q95. Or in entering into contract for engagements?

A95. No.

[fol. 666] Q96. Never had such a conversation with them?

A96. No.

Q97. Do you recognize the form of contract of which Plaintiffs' Exhibit "P" is a photostatic copy, as another Form "B" contract?

A97. It is a Form "B" contract of the American Federation of Musicians.

Q98. What can you tell us as to whether the Crystal Ballroom at Dubuque, Iowa, could have obtained the services of Buddy Fisher and his orchestra for November 23, 1941, through Frederick Bros. Music Corporation, through the use of any other form of contract?

A98. They could not.

Q99. And by "they", you mean the owners of the ballroom?

A99. That is right.

Mr. Roberts: I will offer in evidence Plaintiffs' Exhibit "P".

Mr. Wilson: No objection.

Mr. Cohen: No objection.

(Said document was accordingly received, marked Plaintiffs' Exhibit "P", certified under the name and signature of the Notary and Commissioner, duly made a part of this [fol. 667] deposition and returned herewith, the same being in words and figures as follows, to-wit:—)

Contract Blank No 569

FREDERICK BROS. MUSIC CORPORATION

520 NORTH MICHIGAN AVENUE

CHICAGO, ILLINOIS

THIS CONTRACT for the personal services of musicians, made this 6 day of NOVEMBER, 194 1

between the undersigned employer (hereinafter called the employer) and ELEVEN-ONE VOCALIST musicians (including Leader) (hereinafter called employee(s)) represented by the undersigned representative

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of BUDDY FISHER, according to the following terms and conditions:

Name and Address of Place of Engagement CRYSTAL BALLROOM, DUBUQUE, IOWA

Date(s) of Employment NOVEMBER 23, 1941

Hours of Employment 9pm to 1am

$50 — deposit received

Plaintiffs'

PRICE AGREED UPON $ 100.00 GUARANTEE; PRIVILEGE 50%
(Terms and Amount)

To be paid $50.00 DEPOSIT, BALANCE NOVEMBER 23, 1941
(Specify When Payments Are To Be Made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer ROY BARTELS

Street Address P. O. BOX 371

City or State DUBUQUE, IOWA

Phone

Accepted by Employer Roy Bartels

Accepted Buddy Fein
(Orchestra Leader)

By
(Representatives of Employees)

FORM B
Printed in U. S. A.

Plaintiffs' Exhibit "P" attached to Deposition.

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NAME OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Buddy Fisher (Leader)	12	508-09-9482	11.55
George Veal	413	400-12-2035	5.50
Jack Moore	512	512-12-0266	5.50
George Drew	512	521-24-6143	5.50
Benny Hawkins	655	262-01-3018	5.50
Paul Hadsock	655	267-01-3374	5.50
Harry Webster	396	524-03-5839	5.50
Joe McInerney	512	400-12-2157	5.50
Bill Ormiston	512	432-01-0004	5.50
Bud Palzer	512	509-18-2214	5.50
Nicholas Musolino	265	512-05-8238	5.50
Warren Burrett	512	507-12-6790	5.50
Gypsy Edwards	Vocalist	381-03-0035	6.00

Plaintiffs' Exhibit "P" attached to Deposition.

[fol. 670] Mr. Roberts: I believe that is all Gentlemen.

Cross-Examination.

By Mr. Cohen:

Q100. Mr. Kayser, I believe you stated that Plaintiffs' Exhibits "O" and "P" were entered into by the plaintiffs in this action for the services of Tiny Hill, and Buddy Fisher, respectively, and that you signed both of those contracts; is that correct?

A100. That is correct.

Q101. Now, were there any other contracts entered into for those engagements on September 28, 1941, and November 23, 1941?

A101. No, those are the only contracts that were entered into for those particular dates.

Q102. Did those contracts represent the entire agreement between the parties for the engagements on those dates?

A102. They did.

Q103. Now, Mr. Kayser, do you know who the members of those orchestras were on these respective dates?

A103. No, I do not.

Mr. Cohen: No further questions.

[fol. 671] Mr. Wilson: I have no questions.

Mr. Roberts: I have no further questions.

(End of deposition.)

Mr. Fuller: (Commissioner): Mr. Witness, counsel have stipulated to waive the reading and signing of your deposition. Do you wish to waive the reading and signing of your deposition?

The Witness: Yes, I waive the reading and signing of my deposition.

The reading of his foregoing fully transcribed deposition, and the signing thereof by the said witness, Joseph L.

Kayser, were by stipulation by and between counsel for the parties, and by the witness, duly waived:

ROY E. FULLER,
Notary Public, Cook County, Illinois.

My Commission expires June 7 A. D. 1947.

(Seal) Commissioner

[fol. 672] Mr. Cohen: I want to recall Mr. Breyley for a moment.

And the said

JAMES K. BREYLEY, of lawful age, having been by me, the said Roy E. Fuller, as Notary Public and Commissioner, as aforesaid, heretofore first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, was further examined upon oral interrogatories, and he did thereupon further depose, testify and say as follows, viz.:

Cross-Examination (Resumed)

By Mr. Cohen:

Q119. Mr. Breyley, you testified on direct examination that Plaintiffs' Exhibit "L" was a true copy of the contract which you signed for the engagement of the orchestra under the leadership of Bill Carlsen, at Crystal Ballroom, on August 17, 1941; is that correct?

A119. That is right.

Q120. Now, was any other agreement entered into with Crystal Ballroom at that time?

[fol. 673] A120. No.

Q121. Does Plaintiffs' Exhibit "L" represent the entire agreement, as you understand it, for the services of those musicians?

Mr. Roberts: Objected to as irrelevant and immaterial, the witness not shown competent.

By The Witness:

A121. Yes.

By Mr. Cohen:

Q122. There was no modification or alteration of that agreement by Crystal Ballroom, so far as you know; is that correct?

A122. That is right.

Q123. Now, I call your attention to Plaintiffs' Exhibit M: Did you testify that you had signed that contract for the services of Griff Williams, at Crystal Ballroom, on September 1, 1941?

A123. Yes.

Q124. Was there any other contract executed for the services of that aggregation on that date?

A124. No.

Q125. Are you able to state, Mr. Breyley, that Plaintiffs' Exhibit "M" represents the entire agreement covering the services of the orchestra under the leadership of Griff [fol. 674] Williams, for the engagement at Crystal Ballroom on September 1, 1941?

A125. That contract was the only record of any agreement, but when we sell a band to a customer, we sell them certain things that are frequently not in the contract; in other words, we guarantee—or agree to give them certain publicity, of certain people, and so forth; you see, that would not appear, that is why I say that is a tough question to answer.

Q126. Well, what terms other than these?

A126. That represents the terms of the money; that represents the hours, and the number of people; but in addition to that there are other things that you have—either in letter, or verbally, when you are selling the date, which explains what is in that thing, and so forth.

Q127. Was there anything so far as the relations between the Crystal Ballroom and the musicians, other than what was stated in this contract?

Mr. Roberts: Objected to as calling for the opinion and conclusion of the witness, and the witness not shown competent.

Mr. Cohen: Answer that.

By The Witness:

A127. Between the side men in the band, and the em- [fol. 675] ployer, the Crystal Palace?

By Mr. Cohen:

Q128. Did you ever sign any agreement on behalf of Griff Williams which was at variance with any of the terms of Plaintiffs' Exhibit "M"?

Mr. Roberts: Objected to, as confusing.

By The Witness:

A128. On that date? No.

By Mr. Cohen:

Q129. Yes. A129. No.

Q130. For that engagement?

A130. No.

Q131. In other words, is it correct to state that no agreement was entered into by Crystal Ballroom and Music Corporation of America, which altered, varied, or contradicted any of the terms of Plaintiffs' Exhibit "M"?

Mr. Roberts: Wait a minute! Read that question.

(The pending question as above recorded was read by the reporter.)

By Mr. Cohen:

Q131. (Continuing) Is that a fair statement?

A131. Well, it is, and it is not.

[fol. 676] Q132. Well, in what respects isn't it?

A132. Well, for example, I don't remember now where Griff Williams was playing at the time that I sold that job, but we would tell the customer on the phone where the band was playing, and where they were coming from, what air time they had, and so forth, which is a verbal part of the contract, because he is buying it on that.

Q133. Well, will you read Plaintiffs' Exhibit "M" and tell us whether you ever agreed to anything at variance with any of the terms set forth in that contract? (Handing document to the witness.)

A133. Well, we never agreed to anything at variance with that, no.

Mr. Cohen: That is all.

Cross-Examination.

By Mr. Wilson:

Q134. I believe you stated a moment ago that there were certain letters you sent to them explaining certain

things covered by the agreement: Could you elucidate on that a little further?

A134. Well, I wouldn't say that there was a letter on that particular job.

Q135. No?

[fol. 677] A135. We would send them a letter describing the band, describing the places they had played, and the number of people, and so forth—or, you might do it on the phone, you might send it by wire, you might send a circular.

Cross-Examination.

By Mr. Cohen:

Q136. Is it correct—

Mr. Roberts: Who is examining?

Mr. Cohen: May I ask a question?

Mr. Wilson: I yield.

By Mr. Cohen:

Q136. Is it correct that all those matters were preliminary to the execution of this contract, Mr. Breyley?

A136. Yes.

Cross-Examination.

By Mr. Wilson:

Q137. Now, would you say that a letter providing for publicity of certain other persons—I mean, sometimes you would agree to publicize—

A137. A vocalist.

Q138. I didn't hear you.

[fol. 678] A138. Perhaps a vocalist.

Q139. I mean, you agreed to publicize?

A139. No, we don't publicize anyone. We furnish the publicity.

Q140. You furnish the publicity for certain members of the orchestra; is that correct?

A140. That is right.

Q141. That would be certain side men of the orchestra?

A141. If they are singers.

Q142. If they are known as a feature player in an orchestra?

A142. A singer or an entertainer.

Q143. You would have publicity on those?

A143. Yes.

Q144. Is that correct?

A144. Yes.

Mr. Wilson: That is all.

Redirect Examination.

By Mr. Roberts:

Q145. When you mention about this publicity—furnishing it for the featured entertainers, you mean you were furnishing it about him, don't you?

A145. Yes.

[fol. 679] Q146. That is, he was not paying you for sending out that publicity?

A146. No, no, that is part of the orchestra.

Q147. It is part of your service under your management contract with Griff Williams; isn't that right?

A147. Yes, that is right. We sent publicity on Griff Williams, and probably a girl singer, or any featured vocalist or entertainer in that band.

Q148. And who pays the expense of that?

A148. Music Corporation of America.

Q149. And you are reimbursed for that under your management contract, out of the commission?

Mr. Wilson: Wait a minute! I will object to that.

Mr. Roberts: I will withdraw it.

(Question withdrawn.)

By the Witness:

A149. We are not reimbursed at all; that is part of our service.

By Mr. Roberts:

Q150. Part of your service?

A150. We furnish that for our commission.

Q151. What was that last?

A151. For our commission.

[fol. 680] Q152. Griff Williams is the only one that pays you a commission, isn't he;—

Mr. Cohen: I object to that.

By Mr. Roberts:

Q152. (Continuing)—in the case of his band; isn't that correct?

Mr. Cohen: I object to that question as calling for a legal conclusion.

By Mr. Roberts:

Q152. (Continuing) Who paid you commission on this engagement?

Mr. Wilson: I am going to object to that.

By the Witness:

A152. Griff Williams.

By Mr. Roberts:

Q153. You also sent out publicity material on Bill Carlsen's orchestra, didn't you? A153. Yes.

Q154. And that goes to the establishment that is using the orchestra? A154. That is right.

Mr. Roberts: I believe that is all on redirect.

[fol. 681] Recross Examination.

By Mr. Cohen:

Q155. Now Mr. Breyley, when you stated that Griff Williams would pay you for the publicity which you furnished purchasers of the music, concerning side men—featured side men, and vocalists in the orchestra, will you describe what was the procedure by which that payment was made?

A155. There was no payment made from Griff Williams for publicity.

Q156. How is that payment made?

A156. There was no payment made for publicity. We shipped pictures and mat stories to the customer on a band, and we absorb the cost; we don't charge any band for publicity costs.

Q157. And you regard that as part of the service?

A157. As part of our service.

Q158. For which a commission is subtracted from the amount you receive from the purchaser; isn't that correct?

A158. Your commission is figured on your contract price; all we take from the band is the commission; we don't get any money from publicity.

Recross Examination.

By Mr. Wilson:

[fol. 682] Q159. Let me ask this: I mean, the publicity comes from just the general revenue, whoever pays?

A159. That is right. We have a regular Publicity Department which publicizes all of our attractions.

Q160. There is no specific charge against any particular person with whom you might have a contract?

A160. Oh, no. We don't even keep a record of what one costs us.

Mr. Wilson: No further questions.

Redirect Examination.

By Mr. Roberts:

Q161. One further question: In your answers to cross-examination questions, I think you referred to the Crystal Ballroom as an "employer": You were not trying to express any legal opinion? A161. No.

Q162. As to who was the employer of the orchestra?

A162. No, we call the men who buy attractions, "customers", "employers".

Q163. It has no legal significance?

A163. No, none whatsoever, any more than you could call a man who is operating a ballroom as a legitimate business, a promoter, and that is what we call him, it [fol. 683] is just an attraction.

Mr. Roberts: That is all.

Mr. Cohen: That is all.

Mr. Wilson: No further questions.

(End of deposition.)

Mr. Fuller (Commissioner): Mr. Witness, counsel have stipulated to waive the reading and signing of your deposition. Do you wish to waive the reading and signing of your deposition?

The Witness: Yes, I waive the reading and signing of my deposition.

[fol. 691] The Court: By agreement the intervener is placing the witness on the stand out of time and out of order.

OSCAR F. HILD, called as a witness on behalf of the Intervener, and first duly sworn by the Clerk, testified as follows:

Direct Examination.

By Mr. Joseph A. Padway:

Q. Your full name is Oscar Hild? A. Oscar F.

Q. Where do you live? A. Cincinnati, Ohio.

Q. What is your business?

A. President of the Musicians Association, Cincinnati, No. 1, and member of the International Executive Board of the American Federation of Musicians.

Q. That means you are an officer of the Board of the International organization, the parent organization of the Local organizations? A. That is true.

Q. And it is international because with it are affiliated the Unions of Canada?

A. That is true.

Q. That is the reason it is called and known as the In-[fol. 692] ternational Union; is that correct? A. Yes.

Q. You are President of Local Board No. 1, and that is in Cincinnati? A. That is correct.

Q. How long have you been a musician?

A. About thirty years—thirty-two years.

Q. How long have you been a member of the Union?

A. About the same length of time.

Q. Were you a member of the Board in 1941, of the General Executive Board of the International Union?

A. Yes, I was.

Q. You are familiar with what went on in this meeting? A. Yes.

Q. In 1941 were meetings held by the Executive Board?

A. There were.

Q. Were you present at any of the meetings at which action was taken respecting the so-called Form B contract that has been discussed so much during this trial?

A. I was present.

Q. Do you recall when that Form B contract was adopted as a form to be used by the various leaders of orchestras contracted for engagements in this country?

A. The meeting lasted from some time in January un [fol. 693] til some time in late February.

Q. Where was it held? A. Miami, Florida.

The Court: That would be 1941?

A. '41.

Q. At that meeting was any action taken with respect to Article X, Section 29? Do you recall which Article I refer to?

A. Article X, Section 29, which refers to the rights and duties of orchestra members, dance orchestra members.

Q. They contract not with the establishment but with the fellow members? A. Yes.

Q. What action was taken respecting that?

A. Positive action was taken to import to the members, all of them, that they were to change their method of operation in order that thereby the doubt may be removed regarding the employer and employe status of members.

Q. How was the action taken; was it by action before the Board or by the President requesting the Board to approve of his proclamation?

A. The President of the Federation who was in attendance at the Board meeting submitted this change, the general matter of change of law. Our law provides that [fol. 694] the Executive Board does not have the authority to change the law, consequently the Board discussed it at length, and then directed the President, under his powers in Article I, Section 1 of the Constitution, which gives to him the exclusive right to change laws when an emergency exists, but with the general agreement that those powers will be exercised only in connection with the advice of the Executive Board. The Executive Board thereupon instructed the President to promulgate and issue the necessary rulings with reference to our men, our members.

Q. Did the President promulgate those rules?

Mr. Charlton: Objected to as not the best evidence, and calling for the opinion and conclusion of the witness.

Mr. Padway: I am just asking, did he promulgate the ruling.

Mr. Charlton: I withdraw the objection.

A. The President promulgated the ruling.

Q. Was it approved by the Executive Board?

A. It was.

Q. Was that ruling under the power you have mentioned in your statment of Article I, Section 1?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness.

[fol. 695] The Court: Sustained. (Intervener excepts).

Q. I am asking in the discussion of the meeting was anything said of the powers under which Mr. Petrillo, that is the man who made the ruling? A. Yes.

Q. Mr. Petrillo discussed it?

A. The Executive Board is cognizant of the fact that the Executive Board, under our laws does not have the power to execute such ruling, promulgate such rules and laws, and the power is distinctly given to the President of the Federation of Musicians, and so at the direction of the Executive Board the President was instructed to promulgate such laws forthwith.

Q. What section of the Constitution gives the President that right? A. Article I, Section 1.

Q. Is that the power that he was presumed to act under at that time? A. Yes.

Q. What was the ruling—did it take any concrete form?

A. Yes. The concrete form was that from a given point on all members of the American Federation of Musicians were in fact ordered to divest themselves of any previous right imported as employers and were told that there-[fol. 696] after they must divest themselves of the inherent right of employers and transfer those rights to the purchasers of their services.

Q. What form did it take?

A. In a letter addressed to the members of the Home Local, and a letter addressed to the booking agencies.

Q. Was it presented in the form of a contract known as Form B? A. Yes.

Q. Did a Form B contract accompany the letter?

A. Form B. accompanied the letter, and they were delivered to each Local, and the booking agencies.

Q. Was that sent to all Locals? A. Every one, yes.

Q. Is that letter pleaded by the complainant and set forth as an exhibit of the plaintiff?

A. You showed me a letter some days ago. I admit it is.

Q. I mean it is a copy attached to the complaint; to the complaint is attached this letter?

A. Yes, it is in the pleading.

Q. I will ask you to look at this letter where it says, reading from the exhibit:

To all Locals of the American Federation of Musicians:

[fol. 697] Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with Grand Opera Companies and Symphony Orchestras.

This contract is the one which has been adopted by the International Executive Board for the purpose of protecting our members under the Social Security laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

That is correct?

A. Yes.

Q. You will notice it says in the letter "adopted by the International Executive Board." Just what do you mean by that; what action did they take?

A. President Petrillo came before the Executive Board with this general matter of advisability of changing our laws. The Executive Board being in session for some two and a half weeks went thoroughly into the matter and constructed a contract and thereafter directed the President to promulgate necessary laws effecting that contract's adoption. It must be understood that up to this time there were about 128 different contract forms in use. It was now our purpose to have all members subject to engagement under only one form of contract. This Form B is the form adopted.

[fol. 698] Q. Was that adopted at that time for the promulgation of a new rule by the President? A. Yes.

Q. And was the method used by making that known in a letter to the Locals? A. That is true.

Q. And had this provision of Article X, Section 29, become inoperative?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness; not the best evidence; and contrary to the provisions of the By-Laws and the letter referred to, and in no manner binding upon the plaintiffs.

Mr. Padway: I will withdraw the question.

Q. When did the rule that you have just said was promulgated and approved by the Executive Board by the President changing Section 29, Article X, go into force and effect?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, that a rule, or what constituted a rule, ever did go into force and effect, immaterial and irrelevant.

The Court: Sustained. Those are matters of record. (Intervener excepts).

Q. All right. Let me put it this way: The date set forth [fol. 699] in that letter to the Locals is the date when Form B became operative? A. June 1st.

Q. It has been testified to here that the band leaders and their orchestras contracted for employment through the medium of booking agents. Was that the system in vogue in 1941? A. Yes.

Q. Was it in vogue before that?

A. It has always been in vogue in our business, it seems.

Q. The booking agency is an employment agency?

A. It is no different from an employment agency.

Q. No different than a private employment agency?

A. I don't think so.

Q. They are paid a commission?

A. They are paid a commission for their services in obtaining engagements.

Q. For the amount stipulated in the contract?

A. That is true. They appear almost solely in the dance field.

Q. And some in the movie stars?

A. Yes, movie stars, that is true.

Q. They book them too? A. Yes.

[fol. 700] Q. Now you have heard mentioned here, because you have sat through the trial, the contract that was entered into by Moorhead, Menke, Lawson — do you recall those gentlemen? A. I do.

Q. I don't think you will disagree that this form of contract was used in all those engagements referred to?

Mr. Charlton: I think every engagement involved in this case, with the exception of the one which has been removed by payment of the amount claimed, is a Form B contract.

Q. Now I show you this Form B contract. You have heard it testified here in questions put by counsel to Mr. Menke and Mr. Moorhead and Mr. Lawson, those three gentlemen, that if a man was to be discharged they discharged the man. You heard that testimony, did you?

A. I did.

Q. You are familiar with this contract, are you?

A. Yes.

Q. Did you participate in the drafting of it? A. Yes.

Q. At the Miami meeting you have explained?

A. Yes.

Q. Now under the contract offered here, did Mr. Moor-
[fol. 701] head, Mr. Geer, have the right, and Moorhead the right to discharge?

Mr. Charlton: That is objected to as calling for the opinion and conclusion of the witness, and invading the province of the court in deciding one of the controversies in this case.

Mr. Padway: I would not have put that question at all except for this fact, and I have made myself clear to show the court so he may know why I am putting it, and if the court wants to adhere to the ruling I think we want an exception. In the complaint in this case the counsel specifically set forth that Form B and that language in Form B that the employer was at all times to have complete control of the services of the employe is ambiguous, and must be read as pertaining to results rather than methods and means. They pleaded that. They have put that in issue. Now here is a witness who drafted the contract and who can tell us whether Moorhead had the right of discharging. But this case has gone off, so far as the plain-

tiff is concerned, on what the leader did. He is the only one that did that, which is altogether beyond the issue, and that is why we have failed to cross-examine on that altogether; but under the contract, who has the right to do [fol. 702] that, that is the issue in this case. If they had pleaded no ambiguity, and if they had reached no so-called subterfuge it would be immaterial, but it is material now in view of what they have pleaded for this witness to state who has the right under Form B to discharge an employe. To put it in another way, does the establishment and the person who operates it have the right to discharge. It is very material and relevant to the question they have put. They have put the question, did you exercise the right to discharge to Mr. Moorhead. They put the same question to Mr. Lawson. They put the same question to Mr. Menke. All of them answered they did. But they abstained rather definitely from asking any of their witnesses, did you have the right, Mr. Geer, Mr. Bartels, did you have the right to discharge. Now I say it is our case to meet that subject of discharge, that it is relevant to find out whether the person that purchased the music had that right unless counsel will state they had that right, but if counsel is going to content that Mr. Bartels did not have the right, Mr. Geer did not have the right, that is relevant for me to ask of this witness, under the Form B contract, does the purchaser of the music, the man that signs the contract, have the right to discharge, and I say for that reason the [fol. 703] question is pertinent, and I make the offer.

Mr. Charlton: The same objection.

The Court: I am very well satisfied with my ruling, although I will be glad to have you offer your proof.

Mr. Padway: I will put the same question again.

The Court: No use putting the same question.

Mr. Padway: I thought it would be easier.

Q. Mr. Hild, under that contract, now I am referring to the contract that has been offered here in evidence, under Bartels' evidence, does Mr. Bartels have the right to direct the leader to discharge an employe?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness on a legal matter, the witness not

shown qualified, invading the province of the court, immaterial and irrelevant what this witness' opinion is, and not the best evidence.

The Court: Sustained. (Intervener excepts).

Q. Mr. Hild, under that contract is Mr. Moorhead, Mr. Menke, Doc Lawson, obliged to discharge an employe, a side man, upon request of the purchaser of the music?

Mr. Charlton: The same objection.

The Court: The same record. Sustained. (Intervener excepts).

Mr. Padway: Will it be understood that I put that question with respect to all those three individuals?

[fol. 704] The Court: I thought you did, but you can ask it.

Mr. Padway: The ruling would be the same?

The Court: Yes. (Interveners except).

Mr. Padway: It is understood, without going into great formalities that I am offering the proof with respect to those questions and making an offer to prove that Mr. Bartels, Mr. Geer, having these contracts with these band-leaders mentioned, did have the right of discharge, and did have the right to request persons to be hired. I want to have the court consider that I am making an offer to prove with respect to that, and it may be considered, and of course the court's ruling will naturally close it.

Mr. Charlton: To the offer the complainants object on the grounds stated in the last full objection.

The Court: Sustained. (Intervener excepts).

Q. In your capacity as officer of the International Union did you learn that certain band leaders took the position under Form B contract that they were not employer and were not obliged to pay the social security tax to the Government? A. Yes, sir.

Q. Did you learn that as a result of that objection on their part the question was submitted to the Bureau of Internal Revenue?

[fol. 705] A. I did.

Q. Did you learn that the Bureau of Internal Revenue thereupon examined Form B, examined the circumstances, and made rulings? A. Yes, sir.

Q. I now show you what purports to be a certified copy of a ruling made by the Treasury Department.

Mr. Charlton: Maybe we can stipulate on that.

Mr. Padway: May it be stipulated that Exhibit, Intervener's No. 1, which purports to be a certified copy of a ruling by the Treasury Department, Bureau of Internal Revenue, and addressed to the Stevens Hotel Corporation relating to the status of Mr. Heatherton, band leader, and working at that hotel, and that such status was with reference to or had in connection with the payment of the social security tax, and that this is a true copy of the ruling?

Mr. Charlton: It is conceded that the instrument is a true copy of the ruling and may be received in evidence for all purposes as if it was the original subject to the objection that it is incompetent, immaterial and irrelevant, and has no bearing on this case.

The Court: I will take it subject to the objection. I don't [fol. 706] know anything about that at the present time. (Plaintiffs except).

Int. Ex. 1
12-13-44
H E R

United States of America

FILED
DEC 13 1944
N. T. Reed
CLERK

TREASURY DEPARTMENT
WASHINGTON

December 7 , 19 44

URSUANT to the provisions of Section 661, Chapter 17, Title 28 of the States Code (Section 882 of the Revised Statutes of the United States), by certify that the annexed are true copies of copy of letter dated April 41, to Stevens Hotel Corporation, Chicago, Illinois, from Guy T. Helvering sioner; Contract dated January 28, 1941, between Stevens Hotel and Music ation of America.

e in this Department.

Intervenors Exhibit 1.
Filed in U. S. District Court December 13, 1944.

Interveners Exhibit 1.
Filed in U. S. District Court December 13, 1944.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Chief Clerk, Treasury Department.

Department Stock Form 2947

U.S. GOVERNMENT PRINTING OFFICE

Stevens Hotel Corporation,
Michigan Boulevard at Balbo Drive,
Chicago, Illinois.

Attention: Mr. J. A. Jones,
Resident Manager.

Sirs:

Reference is made to your letter dated March 19, 1941, in which you submit certain information requested by this office in connection with a determination of the status, for purposes of the taxes imposed by Subchapters A and C of Chapter 9 of the Internal Revenue Code (Federal Insurance Contributions Act and Federal Unemployment Tax Act, respectively), as amended by the Social Security Act Amendments of 1939, of Mr. Leo Heatherton and the musicians performing services under his direction at your establishment pursuant to a contract dated January 28, 1941.

You express the opinion in your letter that the legal relationship of employer and employee does not exist between the Stevens Hotel Corporation and Mr. Heatherton and the members of his orchestra. It is contended by you that Mr. Heatherton is an independent contractor, and your reasons for so believing are set forth.

Consideration has been given to the reasons set forth in your letter. However, it is noted that under the terms of the contract pursuant to which the orchestra is performing services, the Corporation engages the personal services of eight musicians and a girl vocalist under the leadership of Mr. Heatherton. The contract specifies the place where the engagement is to be performed, the dates of the engagement, and the lump-sum weekly payment for the services of the orchestra. It is expressly stated in the contract that the Corporation shall have complete control of the services to be rendered thereunder. It is also provided that Mr. Heatherton as leader shall distribute the amount received from the Corporation to the musicians in accordance with the list appearing on the reverse side of the contract. Such list shows the names of the members of

Filed in U. S. District Court December 13, 1944.
Intervenors' Exhibit 1.

AAC:RR:3

Stevens Hotel Corporation.

the orchestra, their social security account numbers, and their individual compensation. The contract is signed by a representative of the Corporation and by an employee of the Music Corporation of America, a booking agency, for Mr. Heatherton.

In view of the express terms of the contract it is clear that the Corporation has the right to exercise over Mr. Heatherton and the other members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, held that Mr. Heatherton and the other members of the orchestra are employees of the Stevens Hotel Corporation for purposes of the taxes in question.

Respectfully,

(Signed) Guy T. Helvering

Commissioner.

cc Collector,
Chicago, Illinois.

Interveners' Exhibit 1.
Filed in U. S. District Court December 13, 1944.

Contract Blank

AMERICAN FEDERATION OF MUSICIANS

Local Number 10

THIS CONTRACT for the personal services of musicians, made this [illegible] day of [illegible], 194[illegible]

between the undersigned employer (hereinafter called the employer) and [illegible] musicians (including Leader) (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of RAY HEATHERTON, according to the following terms and conditions:

Place of employment STEVENS HOTEL

Filed in U. S. District Court December 13, 1944.
Intervenors Exhibit 1.

Place of employment STEVENS HOTEL

Date(s) of employment Begin. Saturday, March 1st, 1941, to April 11, inclusive.

Price agreed upon $ $1050 weekly, which price includes transportation
(Terms and amount)

To be paid Weekly
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer STEVENS HOTEL By

Street Address Balbo and Michigan

City or State Chicago, Illinois

Phone

RECEIVED FEB 18 1941 OF MUS.

Accepted by Employer

Accepted MUSIC CORPORATION OF AMERICA.
(Corporate Leader)

By
(Representative of Employees)

B-3

FEB 19 1941

515

NAMES OF EMPLOYEES	S. S. NUMBER	WAGES
RAY HEATHERT (Leader)	113-01-4532	$110.88
CONRAD SILKE	113-07-2240	96.12
ART LEE	092-05-6720	96.12
ART KEAR	072-12-8 [illegible]	89.52
CARMINE FURIA	089-05-3106	89.52
VINCENT BISHOP	095-14-3970	89.52
~~EARL McCONNELL~~	054-07-~~8684~~	96.12
ED GRIFFIN	212-14-3609	89.52
BILL TELFER	113-01-9682	89.52
JUDY CLARK	103-12-7626	50.00
* Transportation, commission, miscellaneous.		144.82
		TOTAL $1050

Intervenors' Exhibit 1.
Filed in U. S. District Court December 13, 1944.

[fol. 712] Mr. Padway: The same with reference to Interveners Exhibit No. 2. I offer that, and that purports to be a ruling from the Commissioner of Internal Revenue.

Mr. Charlton: The same objection, and the same concession.

The Court: The same ruling. (Plaintiffs except).

United States of America

TREASURY DEPARTMENT

WASHINGTON

FILED

DEC 13 1944

N. T. Reed

CLERK

December 7, 1944

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the d States Code (Section 882 of the Revised Statutes of the United States), by certify that the annexed are true copies of letter dated October 9, (with copy of contract attached), to Commissioner of Internal Revenue, gton, D. C., from William J. Korth, Collector of Internal Revenue, Salt City, Utah, in re: Jerry Jones, DBA Rainbow Randevu Ballroom; Copy of r dated October 18, 1944, to Collector of Internal Revenue, Salt Lake City, from Victor H. Self, Acting Deputy Commissioner, in re: Rainbow Randevu oom.

le in this Department.

Filed in U. S. District Court December 13, 1944.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

Arthur Leland

~~F. A. Birgfeld~~

Acty Chief Clerk, Treasury Department.

Asst W W Bamm

U. S. GOVERNMENT PRINTING OFFICE

1944.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

SALT LAKE CITY 1, UTAH

OFFICE OF THE COLLECTOR
DISTRICT OF UTAH

IN REPLYING REFER TO

EmT:PBM

October 9, 1944

Commissioner of Internal Revenue
Washington 25, D. C.

Attention: Employment Tax Activities

In re: Jerry Jones, DBA
Rainbow Randevu Ballroom
Salt Lake City, Utah

This office has received an OAR 7010 letter from the parallel office of the Social Security Board, Salt Lake City, Utah, involving the employment of James L. Montgomery, deceased, account number 073-01-6364, musician with Les Brown's orchestra in connection with the above orchestra's engagement at Jerry Jones Rainbow Randevu commencing January 27th, and continuing for a period of two weeks in the year 1944. This office also has a communication from the Collector of Internal Revenue at Los Angeles, California, in which Deputy Collector C. L. Hendrix of the 6th Dist. of California has transmitted the completed Form SS-1a for the 9-30-43 quarter against the above employer involving the engagement of Jan Garber's orchestra for the week of August 6, 1943.

Filed in U. S. District Court December 13,

Intervenors' Exhibit 2.

The taxpayer contends that both of these orchestra leaders was the employer in both of these engagements. He has submitted a statement to support his contention with both of these orchestra leaders, and also a copy of the contract with both orchestra leaders, a copy of the expense schedule of both engagements, together with copies of two letters from the Bureau of Internal Revenue, the first dated May 7, 1941, symbol A:C:RR:3-C and the second, dated May 15, 1943, symbol A:C:RR:3-C. The [redacted] letters pertained to the status of orchestra leader, Sonny Dunha[redacted] operating at the same ballroom.

These instruments are being transmitted herewith for the purpose of securing from the Bureau, a determination of the status of Jan Garber and Les Brown, orchestra leaders in their engagements at the Jerry Jones Rainbow Randevu Ballroom under the Federal Insurance Contributions Act and the Federal Unemployment Act.

The communication from the Collector in the 6th District of California, advises that the Bureau has ruled Jan Garber to be an employee. This office is not in possession of that ruling.

William J. Korth,
Collector of Internal Revenue

FBM/mre

2-3

Intervenors' Exhibit 2.
S. District Court December 13, 1944.

521

Contract Blank

MUSIC CORPORATION OF AMERICA

[redacted]

THIS CONTRACT for the personal services of musicians, made this 21st day of July 1943

between the undersigned employer (hereinafter called the employer) and Sixteen (including Leader) musicians (hereinafter called employees) represented by the undersigned representative

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Jan Garber according to the following terms and conditions

Place of employment Rainbow Randevu, Salt Lake City, Utah

Date(s) of employment August 6, 7, 9, 10, 11, 1943

Hours of employment 9:00 P.M. to 1:00 A.M.

Price agreed upon $ 2,500.00 plus 50% gross receipts over $5,000.00
(Terms and amount)

To be paid _____
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Intervenors' Exhibit 2.
Filed in U. S. District Court December 13, 1944.

Name of Employer Jerry Jones

Street Address Rainbow Randevu

City or State Salt Lake City, Utah

Phone

FORM 1

Accepted by Employer (signed) Jerry Jones
Jan Garber

Accepted (signed) A. T. Michaud, Mgr.
(Orchestra Leader)

By (signed) Earl F. Bailey
(Representative of Employer)

MUSIC CORPORATION OF AMERICA

523

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
Jan Garber (Leader)	10	522-26-9410	
Buford Leroy Crouch	47	507-07-3728	
Joe Degulli	208	428-20-6216	
Hugo D'Ippolito	802	091-07-3403	
Charles Ford	10	569-10-4296	
Jack H. Dougherty	99	445-12-7636	
Arlyn Lupies	8	395-02-7721	
Loren Holding	47	564-12-9756	
William Arthur Kleeb	99	544-03-6325	
Carl Ladra	802	283-10-8828	
Robert N. Milliken	60	172-14-0651	
Dean Sayre	60	163-14-0795	
Jack Swift	Vocalist	412-07-8134	
Maurice Joseph Winter	368	455-24-5349	
George Annis	60	206-03-5916	
Wallace Leonard Sandberg	Vocalist	322-10-8629	
Francis Annis	60	207-16-6759	
Leona Martin Lewis	Vocalist	551-28-0736	

Filed in U. S. District Court December 13, 1944.
Intervenors' Exhibit 2.

525

R-5

Rainbow Rendevu Ballroom

RETURN TO MAIL & FILES -- A&C-EMT

A&C:RR:3-SAH

OCT 18 1944

Collector of Internal Revenue,
Post Office Box 1288,
Salt Lake City 10, Utah.

Attention: EmT:YBM.

Reference is made to your letter dated October 9, 1944, and enclosures, relative to the Federal employment tax status of Mr. Les Brown and Mr. Jan Garber and the members of their orchestras with respect to services performed for Mr. Jerry Jones, doing business as the Rainbow Rendevu Ballroom, Salt Lake City, Utah, pursuant to the terms of "Form B" contracts dated December 27, 1943, and July 21, 1943, respectively, copies of which were furnished.

Mr. Jones contends that the leaders and members of their orchestras mentioned above were not his employees irrespective of the form of contract under which they were engaged and refers to the ruling made in office letter dated November 20, 1942. Such ruling holds that Mr. Sonny Dunham and the members of his orchestra were not employees of Mr. Jones with respect to services performed by them pursuant to the terms of a contract dated August 14, 1940, on a contract form of the William Morris Agency, Inc.

The status of leaders and the members of their orchestras depends to a large extent on the terms of the contracts under which their services were performed. The contract under which Mr. Dunham and the members of his orchestra performed their services is similar in terms to that which was considered in Williams v. United States, 129 Fed. (2d) 129 C.C.A. 7, 1942. The Bureau has decided to follow the decision reached in that case in determining the status of orchestra members who perform services under contracts and circumstances and conditions which do not differ in any material respect from the cited case.

The terms of the contract commonly referred to as Form B, the form of contract adopted by the American Federation of Musicians for use in connection with engagement of musicians on and after June 1, 1941, provide for the employment of a certain number of musicians, including the leader, designated as employees, to render personal services for the purchaser, the employer; that the employer shall, at all times, have complete control over the services which the employees will render under the specifications of the contract; and that on behalf of the employer the leader will distribute the amounts received from the employer to the employees, including the leader.

Filed in U. S. District Court December 13, 1944.
Intervenors' Exhibit 2.

A&C:RR:3-SAH

Collector of Internal Revenue,
Post Office Box 1288,
Salt Lake City 10, Utah.

The extended consideration which has been given to the terms of the "Form ?" contract, and the circumstances and conditions under which the leaders and members of their orchestras perform services thereunder, has led to the conclusion that the purchaser of the music has the right to exercise over the leader and the members of the orchestra the direction and control prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee between the parties. Whether or not such right is actually exercised is immaterial so long as the right exists. It is, therefore, the ruling of the Bureau that leaders and members of the orchestras who perform services under this form of contract are employees of the purchasers for Federal employment tax purposes. Your attention is invited to paragraph two of A.C.I.T.-Mimeograph Coll. No. 5638.

SAH:JMC

[illegible]

Acting Deputy Commissioner.

Interveners' Exhibit 2.
Filed in U. S. District Court December 13, 1944.

[fol. 719] Mr. Padway: Here is another one, which is dated October 18, 1944; and it is offered in the same manner as to form. Intervenors Exhibit 3.

Mr. Charlton: The same objection.

The Court: We will take it subject to the objection. (Plaintiffs except).

[fol. 720] Interveners' Exhibit 3.

Filed in U. S. District Court December 13, 1944.

Treasury Department
Office of Commissioner of Internal Revenue
Washington 25, D. C.

A&C: IT-Mimeograph February 21, 1944.
Coll. No. 5638
R. A. No. 1339

Status of Musicians and Variety Entertainers for Purposes of Employment Taxes under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and for Purposes of the Income Tax Withholding under the Current Tax Payment Act of 1943.

Collectors Of Internal Revenue, Internal Revenue Agents In Charge, And Others Concerned:

1. Many persons who operate theatres, night clubs, restaurants, and similar establishments have asked to be advised whether or not they are the employers of certain musicians and variety entertainers for purposes of the employment taxes imposed by the Federal Insurance Contributions Act and the Federal Unemployment Tax Act and for purposes of withholding under the Current Tax Payment Act of 1943. If such persons (hereinafter called operators) are the employers of the musicians and entertainers, the operators are subject to various requirements in collecting and paying the taxes, and in keeping records of employees and their wages.

2. It is the position of the Bureau that an operator for whom musicians perform services pursuant to a "Form B" contract is the employer of such musicians, including the leader, for purposes of employment taxes and the income tax withholding. The operator, as employer, is re-

quired to collect from the musicians both the employees' tax under the Federal Insurance Contributions Act and income tax under the Current Tax Payment Act of 1943 and to make returns and payments of such taxes to the collector of internal revenue. The operator also is required to pay employers' tax under the Federal Insurance Contributions Act with respect to wages paid by him for the musicians' services and to include such wages in his annual return under the Federal Unemployment Tax Act if he is an employer of eight or more (including the musicians), as defined in that Act. This rule also applies to any entertainer or actor who performs services for an operator under the provisions of a "Form B" contract or other contract having substantially similar provisions.

3. In general, the variety entertainers with respect to whom operators have made inquiries are those who acquire and perform their own repertories in a series of short-term engagements for a number of different operators under contracts which ordinarily specify only the time, remuneration, place, and duration of each engagement.

4. The Bureau is unable, at this time, to rule conclusively on the status of the variety entertainers referred to in Paragraph 3, above. Until a conclusive ruling is made operators of theatres, night clubs, restaurants, and similar [fol. 721] establishments may consider such entertainers to be independent contractors and will not be required to collect tax from such entertainers or report or pay taxes with respect to the remuneration of the entertainers, unless the Bureau determines in a specific case that taxes should be collected, reported, and paid. Each operator should keep records of entertainers' names, account numbers, and wages, however, for the purpose of enabling the operator to make such returns or reports as may be required of him if the operator is subsequently determined to have been the employer of the entertainers.

5. The tentative ruling stated in Paragraph 4, above, will prevail only until such time as a conclusive ruling is published by this office.

6. Inquiries relating to the income tax withholding should be addressed to this office for the attention of IT:P:T. Inquiries relating to employment taxes should be

addressed to this office for the attention of A&C:RR. Correspondence otherwise relating to the contents of this mimeograph should refer to the number thereof and the symbols A&C:RR.

HAROLD N. GRAVES,
Acting Commissioner.

[fol. 722] Mr. Padway: The intervenor presents another ruling of the Treasury Department, and it is dated February 21, 1944, to the Collector of Internal Revenue. I did not have time to get it certified, but it is on a mimeograph of the Government, and I show it to counsel, and I wonder if you will agree that this is a true copy of the February 21st ruling.

Mr. Charlton: The plaintiffs raise no question as to the document being a correct copy of the ruling, but reserve the objection that the same is immaterial and irrelevant, and dated many months subsequent to the events involved in this case, and after this suit was started, and not bearing on any issue in the case.

Mr. Padway: I should say while it is dated some time afterward, as counsel has correctly said, it does bear upon the same subject as Form B bears upon the tax issue, and who is liable for it under Form B, and covers for the withholding tax, and brings the whole tax situation down to that date, and states who is liable for the tax, and it is directly relevant because it goes directly to the contractual status and relationship between the Form B contract, or behind the Form B contract since its adoption.

I have a later ruling, even later ruling than that, dated [fol. 723] November 21, 1944, by the Treasury Department covering the same subject of Form B, which reiterates all the previous rulings, and I should say affirms them.

Mr. Charlton: The same objection and the same concession.

The Court: All right. The same objection and I will take it subject to the objection. (Plaintiffs except.)

[fol. 724] Interveners' Exhibit 4.

Filed in U. S. District Court December 13, 1944.

Treasury Department
Office of Commissioner of Internal Revenue
Washington 25, D. C.

A&C:IT-Mimeograph
Coll. No. 5767
R. A. No. 1394

November 2, 1944.

Status of Variety Entertainers for Federal Employment Tax Purposes and for Purposes of the Income Tax Withholding Under the Current Tax Payment Act of 1943.

Collectors Of Internal Revenue, Internal Revenue Agents In Charge, And Others Concerned:

1. In A&C:IT-Mimeograph Coll. No. 5638, R. A. No. 1339, dated February 21, 1944, it was stated that the Bureau was unable at that time, to rule conclusively on the status of certain variety entertainers. In general such variety entertainers are those who acquire and perform their own repertoires in a series of short-term engagements for a number of different operators under contracts which ordinarily specify only the time, remuneration, place, and duration of each engagement. The Bureau further stated, however, that until a conclusive ruling is made, operators of theatres, night clubs, restaurants and similar establishments may consider such entertainers to be independent contractors.

2. Generally variety entertainers perform their special routines in a series of short-term engagements for a number of different operators of theatres, night clubs, restaurants, and similar establishments under contracts which ordinarily specify only the time, remuneration, place and duration of each engagement. The control, if any, which is exercised by such operators over the performance of their services is purely incidental to the continuity of the entertainment programs. Such entertainers will be considered to be independent contractors for Federal employment tax purposes and for purposes of the income tax withholding under the Current Tax Payment Act of 1943.

3. Paragraph 2 is not applicable in the case of those performers in a "stage show", "floor show", etc., who are clearly in the operator's employ, e. g., an orchestra, glee club, and chorus line.

4. This mimeograph does not change the position of the Bureau with respect to musicians, entertainers, or actors who perform services pursuant to a "Form B" contract or other contract having substantially similar provisions as stated in Paragraph 2 of A&C:IT-Mimeograph Coll. No. 5638, R. A. No. 1339. The rule stated in such paragraph of the mimeograph is equally applicable in the cases where leaders of orchestras pursuant to "Form B" contracts or other contracts having substantially similar terms undertake to furnish a "complete unit of entertainment" comprised of orchestra members and "acts" irrespective of whether remuneration is on the basis of a stated sum or on a percentage of the gross receipts. Variety entertainers performing services under such circumstances and conditions are excluded from the rule contained in Paragraph 2 hereof and are considered to be employees of the operator.

[fol. 725] 5. Inquiries relating to the income tax withholding should be addressed to this Bureau for the attention of IT:P:T. Inquiries relating to employment taxes should be addressed for the attention of A&C:RR. Correspondence otherwise relating to the contents of this mimeograph should refer to the number thereof and the symbol A&C:RR.

JOSEPH D. NUMAN, JR.,
Commissioner.

[fol. 726] Mr. Charlton: Is that booklet in which it is contained, is that it? I am asking this question in the hope we can arrive at a stipulation. Is the booklet in which the section and article which you referred to as contained, the official published Constitution, By-Laws and Standing Resolutions of the American Federation of Musicians of the United States and Canada as amended and adopted at the Forty-sixth Annual Convention held at Seattle, Washington, June 9-14, 1941?

Mr. Padway: Yes, sir, that is one of the many thousands that were printed.

Mr. Charlton: This is an official copy?

Mr. Padway: Yes. And I want to offer in connection with that copy Article 1, Section 1.

Mr. Charlton: No objection. In that connection, as everyone here knows, the Form B contract does incorporate by reference all the By-Laws, all the Constitutions, and whatever they may be, the regulations of the Musicians Union. I am wondering if we can stipulate and agree that the printed book which you have just handed to the reporter may be marked an exhibit 7 and received in evidence as a part of the Form B contract, according to the terms of the contract?

Mr. Padway: Yes, I think we can stipulate that. Of [fol. 727] course I want to make this reservation, that the book while purporting to be the official Constitution with respect to Article X, Section 29, the entire section that bears on that subject, the same is subject to the changes that this witness testified about that were made at Miami. These books are only printed, you know, at definite times, and they do not go right out and print a new one when the Miami meeting acted upon the various sections that conflict with Form B. With that understanding I have no objection to the whole book going in.

Mr. Charlton: That understanding is not unreasonable. Do you also agree, Mr. Cohen?

Mr. Cohen: No objection.

The Court: The whole book is admitted then, I take it?

Mr. Padway: Yes, with that understanding.

[fol. 728] Mr. Padway: Now, Your Honor, I have brought here and offer in evidence the Constitution and By-Laws of 1944 which is a subsequent book, and which shows the changes with respect to Article X, Section 29. I am offering that to show that the changes were duly made in subsequent printed Constitutions.

Mr. Charlton: Further proof as to the matter of the By-Laws, and Constitution and Standing Rules, or the au-

thentication of them is waived, and it is conceded that Exhibit 5 is the Constitution and By-Laws and Resolutions effective on and after the Chicago, Illinois, June 5th convention of 1944, but the exhibit and all its contents are objected to as incompetent, irrelevant, and immaterial, and having no bearing in this case.

Mr. Padway: I would be almost inclined to agree with counsel on the technical issue of relevancy except this, I offer it merely to show, it may be said, well, like your Constitution—may I say my purpose in showing this is when later Constitutions were printed with reference to when this Form B contemplated change and the action taken culminated in a composition which set forth the action in the later Constitution.

Mr. Charlton: There were some intervening publications of the By-Laws?

[fol. 729] Mr. Padway: There may be. I think the 1942 Constitution failed to make the change.

Mr. Charlton: I know it did. You are right about that.

Mr. Padway: That did not quite make much difference because Form B was being circulated and the action of the Board authorized it, but 1944 did incorporate the change. Now if you want to put 1942 in there, I have no objection.

Mr. Charlton: Do you have a copy?

Mr. Padway: I will get you a copy.

Q. You have seen the 1942 Constitution?

A. I am familiar with it.

Q. The 1942 Constitution did not make note of the change which now appears in 1944?

A. That is correct.

Q. Have you anything to say respecting that—why?

Mr. Charlton: Objected to as immaterial and irrelevant, and the witness not shown himself competent, and not the best evidence. We have asked to have that evidence here.

The Court: I don't see how that 1944 book would be competent in this case. We are talking about 1941 and 1942. I will sustain the objection to the 1944 copy of the Constitution. (Intervenor excepts).

[fol. 730] Mr. Padway: Then I am offering only the 1941 copy of the Constitution and the action taken on Section 29, Article X by the Executive Board.

Mr. Charlton: I join in the offer.

The Court: That is all right. It is in.

(See page 284) (Also page 283).

[fol. 731] Interveners' Exhibit 7.

Filed in U. S. District Court December 13, 1944.

Constitution.

By-Laws and Standing Resolutions
Of The American Federation Of Musicians
Of The United States and Canada

As Amended and Adopted at the Forty-sixth Annual Convention, Held at Seattle, Wash., June 9-14

1941

* * * * * * *

By-Laws

Article I—Duties of Officers and Organizers.

Section 1. Duties of President. It shall be the duty of the President to preside at all meetings of the Federation and Executive Board; sign all documents of an official character pertaining to the Federation; sign all vouchers; appoint all committees unless otherwise ordered. It shall be his duty and prerogative to exercise supervision over the affairs of the Federation; to make decisions in cases where, in his opinion, an emergency exists; and to give effect to such decisions he is authorized and empowered to promulgate and issue executive orders, which shall be conclusive and binding upon all members and/or Locals; any such order may by its terms (a) enforce the Constitution, By-Laws, Standing Resolutions, or other laws, resolutions or rules of the Federation, or (b) may annul and set aside same or any portion thereof, except such which treat with the finances of the organization and substitute therefor other and different provisions of his own making; the power so to do is hereby made absolute in the President when, in his opinion, such orders are necessary to conserve and safeguard the

interests of the Federation, the Locals and/or members; and the said power shall in like manner extend to and include cases where existing laws are inadequate or provide no method of dealing with a situation. He shall call special sessions of the Executive Board when necessary; call strikes; draw upon the funds of the Federation to pay the salaries of traveling members accompanying a theatrical organization when called on to strike while on the road, and for the payment, if necessary, of hotel and traveling expenses of other members who are called on strike by him during any emergency when outside of their own jurisdiction and play engagement for which no tax is collected by the Federation, and for which otherwise no strike benefits are paid; draw funds in payment of all expenses occasioned by the exercise of his duties; perform such other duties as may elsewhere be provided for in the Constitution, By-Laws and Standing Resolutions of the Federation; have the casting vote of a tie, and at the end of his term of office he shall report his acts and doings to the Annual Convention of the Federation, and upon convening of the Convention he shall appoint the following committees, viz.: First, Credentials; second, Finance; third, Laws and Supervision; fourth, Measures for the benefit of the Federation, and such other committees as may be voted for by the Convention.

* * * * * * *

Sec. 3. Duties of the Secretary. The Secretary shall keep a faithful record of the proceedings of all meetings; answer all communications appertaining to the Federation; issue all charters upon receipt of a certified list of applicants for membership; inform all locals of all additions to the Federation, as well as all properly presented claims for default of services rendered by members; notify the delegates of all meetings; issue monthly statements of erased, suspended, expelled and transferred members in tabulated form; attest all bills and orders; cause the minutes of each convention to be printed in full and distributed to the Locals not later than thirty days after adjournment; publish not later than the July issue of the International Musician, all laws that have been amended, added to, or in any way changed; he shall send to each Local Secretary every six months a copy of the galley list of the Local for

inspection; he shall in his annual report, under the heading of "List of Locals," designate the jurisdictions of every Local as recognized by the A. F. of M.; he shall add to the list of Locals the name of each Local as it is known in its jurisdiction; procure and preserve the necessary books, papers and other documents appertaining to his office, and transmit them to his successor when properly qualified to receive the same, clear of all incumbrance. And for the faithful performance of his duties he shall receive a salary of fifteen thousand dollars ($15,000.00) per annum, payable semi-monthly; he shall be authorized to employ stenographers, typists and such other clerical assistance as may be necessary, at his own discretion; he shall notify all Presidents of Locals to incorporate an order of business through which members will be instructed to patronize none but union men and purchase only such goods as bear the union label.

Article IX—Rights and Duties of Locals.

Sec. 24. Locals have a right to insist that Local leaders or contractors engage local members to fill miscellaneous engagements outside of the local jurisdiction.

Sec. 27. A Local has the right to prevent a member from colonizing musicians in its jurisdiction. A leader, manager or agent (member of the Local) must obtain the consent of his Local before engaging musicians from outside for permanent or single engagements. But a member so imported shall not be required to deposit a transfer card unless the engagement extends over four weeks. Such member must not fulfill any other engagement until his transfer card has been deposited unless permission is granted by the Local.

Article X—Rights and Duties of Members.

Sec. 13. Leaders, contracting members or other members of a Local who demand, request, induce or try

to induce other members not to play with or for any leader or contracting member, or with or for any other member or members, shall be fined not less than $25.00 nor more than $100.00, or be suspended or expelled from membership by the Local with which they are affiliated.

* * * * * *

Sec. 20. Members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M. (See Article XVI, Contract Forms.)

Penalty: Fine of not less than $100.00.

* * * * * *

Sec. 23. A contracting member who assumes the responsibility for the payment of a member's services is bound by his action, and cannot escape his obligation by claiming the protection of any Local or A. F. of M. law.

Sec. 24. A Leaders of orchestras or bands playing season engagements on boats plying between different ports may engage members from any Local. Where Locals are maintained in such ports the highest price in existence among them governing such work shall prevail. However, if the International Executive Board deems the price maintained by any one Local contrary to the interests of any other Local equally interested, then the International Executive Board shall assume jurisdiction over the engagement and name a price equally binding upon all Locals and members.

* * * * * * *

Sec. 29. Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished, provided that in states or provinces where laws exist, which prescribe a different method of contracting, or where the provisions of law are such that to contract as above prescribed would be contrary to the interests of members, Locals are authorized to establish such method

of contracting as may best conserve the interest to members. However, members may accept engagements from traveling theatre company managements direct, provided their contract, in addition to the signatures of the contracting parties, is countersigned by the musical director of the company or the member of the Federation who engages the members for the company. Furthermore, members may contract with symphony orchestra management direct in conformity with all Local and Federation laws.

If a member violates the above, such action shall constitute his resignation from membership in such Locals where he held membership, and in the American Federation of Musicians.

* * * * * * * * *

Sec. 39. A member of the Federation cannot accept an engagement to join a traveling band or orchestra from a non-member, neither can he negotiate with a non-member for such an engagement.

A member shall be deemed guilty under the provisions of this law if he negotiates for such an engagement as named in the law with a non-member, even though he subsequently signs a contract for the same engagement with a member of the Federation.

A fine of $100.00 shall be imposed upon a member who violates this law, and if failing to obey the instructions of a Local or an officer of the Federation to forthwith surrender such engagement it shall be considered equivalent to his resignation from all Locals wherein he held membership, and in the American Federation of Musicians, and all Locals and members of the Federation must therefore consider him a non-member.

* * * * * *

Sec. 45. Any member, leader or contractor employing members of the A. F. of M. on any traveling, location or out-of-town engagement shall employ only such members who are in good standing in their respective Locals and carry their Local Union Cards paid up to date. For any violations of this section he shall be subject to a fine of not less than $10.00, nor more than $50.00 for each and every violation.

* * * * * *

Sec. 48. Members of the American Federation of Musicians who accept engagements for bands or orchestras must in person sign their contracts for same or give some agent power of attorney to sign their names. They are responsible for the fulfilling of the contract under union conditions, and ignorance of the terms of any contract signed by an agent shall not be valid excuse. The contract must be submitted to the Local Union for inspection in accordance with the rules of the Federation. All collections for the engagement must be made by the member who furnishes the orchestra and not by the agent. Members of the orchestra must be paid by the contracting member or leader of the band or orchestra and not by the agent. All agents who go into collusion with members to defeat the object of this or any other law of the American Federation of Musicians shall be held as unfair to it by the Federation and thereafter members cannot accept engagements from or through them.

The price of an engagement must cover the services rendered by musicians, and nothing else. If an orchestra carries added attractions, such as singers, etc., the contract must show an additional charge to cover their services. Leaders, their agents or contracting members, are prohibited from furnishing singers free of charge on any and all engagements.

If members fail to contract for engagements as herein prescribed or in any way violate the provisions of this law, such action shall constitute their resignation from membership in such Locals wherein they held membership, and in the American Federation of Musicians, and they shall be held as unfair to the Federation.

Article XII—Transfer Members.

Sec. 18

Traveling members other than leaders must sign contracts with contractors, members of the A. F. of M.

Article XIII.

Traveling Orchestras and Members.
Traveling Cards and Tax.
Members Playing Out-of-Town Engagements.

* * * * * *

Sec. 10. * * * * *

C. A contractor or leader, as the case may be, in every case before an engagement is played, must submit his contract for same to the Local Union in whose jurisdiction same is played, or in the absence of a written contract file a written statement with such Local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hours of the engagement, as well as the names of the members who will play same and the Locals to which they belong and the minimum amount of money paid each individual sideman, based on the minimum Local scale.

In addition to furnishing the foregoing information, a contractor or leader, as the case may be, must, before the engagement is played, inform the Local in whose jurisdiction the engagement is played the amount collected as to transportation charges and a point from which the transportation charges are made, and the exact and correct amount of percentage which will be paid to an agent or agents as compensation for booking the engagement.

* * * * * *

I. In the selecting of the members of the orchestra, the leader or manager of same need not confine himself to the membership of the Local in whose jurisdiction the orchestra is organized.

* * * * * *

K. All contracts between leaders and members of traveling dance orchestras wherein a specified number of weeks is not named can be cancelled by either party giving two week's notice to the other.

* * * * * *

L. * * * * *

A member cannot form a traveling dance orchestra in the jurisdiction of the Local to which he belongs, and make such jurisdiction the headquarters of the orchestra, and compete for and fill local engagements with same.

M. . . . . .

Note—In all else the Constitution, By-Laws and Standing Resolutions of the A. F. of M. shall apply to the members of a traveling orchestra.

. . . . . .

Article XVI—Official Forms.

Official Contract Blank for All Engagements.

Contract Blank

American Federation of Musicians
Local Number.....

This Contract for the personal services of musicians, made this.....day of....., 194.., between the undersigned employer (hereinafter called the employer) and.....Musicians
(including Leader)
(hereinafter called employees) represented by the undersigned representative.

Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of....., according to the following terms and conditions:

Place of Employment.....
Date(s) of Employment.....
Hours of Employment.....
.....
.....
.....
Price Agreed Upon $.....
(Terms and Amount)
To be paid.....
(Specify When Payments Are To Be Made)
.....

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said

employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assume liability for the amount stated herein.

Name of Employer.....Accepted by Employer.....
Street Address.....Accepted.....
City or State..... (Orchestra Leader)
Phone.....By.....
(Representatives of Employees)

* * * * * *

Article XVIII—Miscellaneous.

Section 1. Performers on musical instruments of any kind who render musical services for pay are classed as professional musicians and are eligible for membership, subject to the laws of and jurisdiction of the A. F. of M.

* * * * * *

[fol. 732] Q. As a member of the Board have you attended all the conventions of the Federal Musicians?

A. The last five years.

Q. All the Board meetings the last five years?

A. Yes.

Q. Referring to the action taken at Miami in 1941, has that ever been reversed?

A. It has not.

Q. It is still the ruling as promulgated at that time?

A. It is.

Q. Is Form B still being used?

A. It is.

Q. Are your members compelled to use Form B now?

A. Yes.

Q. Were they obliged to use Form B in 1942?

A. They were.

Q. How about 1943? A. The same.

Q. How about 1944? A. The same.

Q. There never has been any change in the action taken on that matter? A. No.

Q. Would it in any way affect the standing or reputation of a band leader or musician, if you know, for instance if he asked—when I say asked—Geer and Bartels asked the lead-

er to change any man at certain times or play certain dance music, or designate the class of music he wanted, in your [fol. 733] opinion?

Mr. Charlton: That is objected to as calling for an opinion and conclusion of the witness, immaterial and irrelevant.

The Court: Sustained. (Intervener excepts.)

Mr. Padway: I just wish to say that is almost verbatim the question asked by counsel, Mr. Roberts of Geer, and Mr. Geer went into a dissertation on that first one, and he said for the purpose of maintaining the reputation the leaders exercised that particular function in the selection of music, and took their own intermissions, and did that for that purpose, for the purpose of building up reputation. I am just merely meeting it.

The Court: Let us comply with the rules of this matter. I have tried a good many lawsuits and I know where I am on this matter. I don't care for any more arguments on that. (Intervener excepts.)

Q. Would it at all affect the character of the music to be played at Mr. Bartels' or Mr. Geer's establishments, so far as the patrons were concerned, if Mr. Geer or Mr. Bartels issued orders as to the selection of music to be played?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness, and no proper foundation laid, [fol. 734] immaterial and irrelevant.

The Court: Sustained. (Intervenor excepts.)

Q. You played in bands, traveling bands?

A. Yes, sir.

Q. Have you exercised the function of a leader of those bands? A. No.

Q. I mean in the sense of leading a band; have you led a band?

A. Once in my life.

Q. Just once in your life. How many traveling bands have you been with?

A. I don't recall, having been with them some years ago, not more than four or five years.

Q. You mean by that over a period of four or five years you traveled with traveling bands?

A. That is true.

Q. With your experience, have you in mind the question I put to you? A. Yes.

Q. Can you answer it?

Mr. Charlton: Same objection.

The Court: Sustained. (Intervenor excepts.)

Mr. Padway: Your Honor, it was on the basis of com- [fol. 735] petency that the court made the ruling?

The Court: Partly. He was not out here to state he knew anything about these bands. He would have to be out here among these bands. He would not be competent about that. I don't want to know about since that time.

Mr. Padway: Would not the court take judicial notice that these traveling bands of this size of Bartels play almost the same thing over the country?

The Court: I could not hardly go that far. I can go far enough in this neighborhood to take quite a little notice of it. I would not say that I would take judicial notice that they are all the same.

Mr. Padway: I will see if we can further qualify him.

Q. Where have you worked for five years that you did work, what five years were they?

A. Oh, 1919 to 1924.

Q. As president of a Union, do your members go out traveling?

A. Our members do go out traveling.

Q. And you come in contact with them?

A. Yes.

Q. Discuss their problems?

[fol. 736] A. Yes.

Q. Their grievances? A. Yes.

Q. And know how bands are constituted?

A. Yes.

Q. You know how bands operate and the circumstances under which they operate over the country?

A. Yes.

Q. What particular territory did you travel?

A. Alabama, Arkansas, Tennessee, Texas, perhaps Georgia, and even down to Florida.

Q. Do the traveling bands that are composed, let's say of anywhere from nine to fifteen or twenty members, the leader, and among the sidemen appear different and operate different in different territories?

A. I don't think so.

Q. Have you been to dance halls in different territories?

A. Quite a few.

Q. Were you over at Babe's last night here in Des Moines? A. I was with you.

Q. I didn't want you to say that. Did they play any different there than they would at any night club of that type in Cincinnati, New York, or any place else?

Mr. Charlton: Objected to as calling for an opinion and [fol. 737] conclusion of the witness, the witness not shown qualified, in spite of his company and visit to Babe's?

Mr. Padway: I am going to renew the question without repeating it.

The Court: You better repeat it. We have forgotten what it was.

Q. Would you say that on orchestra would suffer any detriment in reputation if the establishment contracting for that music was to tell the leader when to take intermission, or when to play a particular kind of music, waltz at one time, a rhumba, at another time different music the patrons wanted?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness in a field of public relations promotion, and a witness not shown qualified, the proper foundation not having been laid, irrelevant and immaterial.

The Court: Sustained. (Intervener excepts.)

Mr. Padway: At this time would it be on the relevancy and materiality?

The Court: Yes. What has that got to do with the matter at issue? It is away out on the limb.

Mr. Padway: It was put in by the other side.

Mr. Charlton: Oh, no.

[fol. 738] The Court: Not in that way.

Mr. Padway: That's all.

Mr. Charlton: Your Honor, I am not going to be able to finish the cross-examination tonight.

The Court: You may adjourn until 9:30 tomorrow morning.

5:00 o'clock p. m. court adjourned until 9:30 a. m., December 13, 1944.

Morning Session, December 13, 1944.

9:30 o'clock.

The Court: We would be up to the cross-examination, but do you have anything else you want to ask your witness?

Mr. Padway: A few things, Your Honor.

Oscar F. Hild, being recalled as a witness on behalf of the Intervenor, testified as follows:

Direct Examination.

By Mr. Joseph A. Padway:

Q. Mr. Hild, were you present at the Seattle Convention of The American Federation of Musicians in 1941?

[fol. 739] A. Yes, sir.

Q. Were you present when the convention took action with respect to the matters that had been acted upon by the Executive Board in the previous meeting?

A. Yes, sir.

Q. What was the action of the convention respecting approval or disapproval of the adoption of the Form B contract by the Board in Miami the previous February?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness, the witness not having shown himself qualified or competent, and not the best evidence, irrelevant and immaterial.

The Court: Overruled. Answer, please. (Complainants except.)

A. It was affirmative.

Q. The convention confirmed it?

A. Yes, sir.

Q. Now following that affirmation was Form B adopted in the convention in 1941? I just want him to answer that yes or no.

The Court: Well, I didn't think of that. You don't mean by the convention? Of course that would naturally follow. You were talking about the convention in Seattle. You don't mean by the convention?

[fol. 740] Mr. Padway: I am talking about the physical incorporation of that action in the Constitution. My question was this: Was the adoption of Form B contract physically incorporated by being printed in the 1941 Constitution?

Mr. Charlton: The same objection. Not the best evidence.

The Court: That would not be the best evidence.

Mr. Padway: This is '41.

The Court: That is already in evidence.

Mr. Padway: No. I am not making myself clear.

The Court: I don't want to keep you out of the evidence.

Q. I will put it this way. On page 176 of the 1941 Constitution there appears this: "Article XVI—Official Form. Official contract blank for all engagements. Contract Blank. American Federation of Musicians. Local Number....." And a full and complete copy of an agreement or form.

Mr. Charlton: What was that article?

Mr. Padway: Article XVI, page 170.

Q. Now you see that it appears there. What is that?

A. It is the form of contract which was adopted at Miami at the previous meeting in January of the previous year.

[fol. 741] Q. And the one that was approved in the convention? A. That is correct.

Q. And is that identical with all of the Form B exhibited here in court? A. Yes, it is.

Q. Now then, Mr. Hild, was that the first time—I will withdraw that. Are you familiar with the provisions of

the printed Constitution of the American Federation of Music? A. I am.

Q. Are they printed annually? A. Usually.

Q. Well, there was a skip in 1943? A. Yes.

Q. There was one printed in 1940? A. Yes.

Q. One in '39? A. Yes.

Q. And going back for about forty years?

A. That is correct.

Q. Are you familiar with those Constitutions in so far as the presence of Form B is concerned? A. I am.

Q. Did Form B ever appear with a regular number or [fol. 742] anything like it in any previous Constitutions?

A. It did not.

Q. Did Article X, Section 29 appear in previous Constitutions? A. It did.

Q. It appeared in 1940? A. It did.

Q. 1939? A. It did.

Q. How many years would you say approximately, to your knowledge, that Article X, Section 29 appeared in former Constitutions?

A. Fifteen or twenty years.

Q. At least fifteen years? A. At least fifteen.

Q. So then the Article XVI in the '41 Constitution was a subsequent Constitutional Article, or adopted subsequent to the Article known as Article X, Section 29?

A. That is correct.

Q. Did Article XVI, the Form B contract, appear in the 1942 Constitution? A. It did.

Q. I show you what purports to be a copy of the 1942 Constitution and direct your attention to page 174 and [fol. 743] direct your attention to the heading in black faced type, Article XVI—Official Forms. Official Contract Blank for All Engagements. And after you have looked at it I ask you whether it is the same form, containing the same rules as were adopted at the Miami meeting?

A. It is the same form.

Q. And it was then in force and effect in 1942?

A. It was.

Q. It was in force and effect in 1943? A. It was.

Q. Still in force and effect? A. Yes, sir.

Q. Appears in the 1944 Constitution? A. It does.

Q. So it has been continuously in force and effect since adoption at Seattle in the Convention? A. It has been.

Q. Mr. Hild, I think you said yesterday you were a musician for how many years? A. About thirty.

Q. You have been an official of the Union for how many years? A. About fourteen.

Q. And have been a member of the Executive Board [fol. 744] for— A. Four years.

Q. Is it encompassed within your duties to take up the business bookings of traveling bands?

A. Yes, I know something of it.

Q. Does the Executive Board—Strike that. In your activities as a member of the General Executive Board are you acquainted with a number of traveling bands in the country, the approximate number? A. Yes, I do.

Q. What are the approximate number of traveling bands in this country here?

Mr. Charlton: Objected to as immaterial and irrelevant.

The Court: You may answer. (Complainants except).

A. About 4,000.

Q. Are you familiar with the classification of them as to size? I take it some are larger than others?

A. They are larger, yes sir.

Q. In your experience have you gathered what is known in an official way as convention bands? A. Yes.

Q. Are they recorded with the American Federation of Musicians? A. They are.

[fol. 745] Q. Is it incumbent upon these bands to record a record of themselves with the American Federation of Musicians? A. Yes, sir.

Q. Most of them make some report with respect to the taxes as shown on the blank? A. Yes.

Q. And thus the Federation gathers the number of men employed? A. That is true.

Q. And these things are discussed at the meetings of the Executive Board?

A. Yes, a survey was made by—

Q. Made by Mr. Rex McCarty, wasn't it? A. Yes.

Q. What can you say as a result of your experience and as the result of your acquiring knowledge as an officer of the approximate percentage of bands that have seven or less and those that have eight or more, if you know?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness, the witness not shown himself qualified, not the best evidence, and no proper foundation laid, immaterial and irrelevant.

The Court: I have not got the point as to the difference in these organizations but counsel seems to put some point [fol. 746] on it, so we will be glad to take the testimony. You may answer, please. (Complainants except).

A. I think they are about evenly divided. Some 2,000 with eight or fewer numbers, and some 2,000 with eight or more members.

Q. Now, Mr. Hild, in a rather facetious vein yesterday I alluded to your being at Babe's the other night, and I was with you. Now I want really to make a point of that in evidence. Will you bear in mind you were there night before last at one restaurant where music is furnished with the meal known as Babe's. Were you there the night before? A. Yes.

Q. And it employs an orchestra? A. Yes.

Q. It furnished dances too? A. Yes.

Q. Give us the number of that orchestra.

Mr. Charlton: Objected to as incompetent, irrelevant and immaterial, and bearing upon an entirely different type of establishment, and having no bearing upon the issues in this case.

The Court: If it has no bearing the court won't consider it. Answer. (Complainants except).

[fol. 747] A. Three.

Q. A piano player, I think?

A. Saxophone and drummer.

Q. We made an observation, didn't we, as to about how many people could be seated in that room we were seated in? A. We did.

Q. What were the number of customers that could be served? A. About 300.

Q. Pretty well filled, wasn't it? A. Yes.

Q. Let us bring out, forgetting the class of music played, or whether dances, waltz, or rhumba, but in so far as the character of the establishment serving the food, serving beverages at the tables, and space for dancing.

and platform on which the musicians were sitting, what I am describing was all present, was it? A. It was.

Q. The intermissions and the like, is that any different than the establishment that was described by Mr. Geer, or that operated by Mr. Bartles, if he operated it?

Mr. Charlton: Objected to as calling for an opinion and conclusion of the witness, and the witness not shown qualified, immaterial and irrelevant.

The Court: We will take it subject to the objection. [fol. 748] You may answer, please. (Complainants except).

A. I think it was different from the establishment operated by these gentlemen.

Q. Now explain the difference as you observed?

Mr. Charlton: The same objection.

The Court: The same record. You may answer. (Complainants except).

A. The difference is in this instance it is part of the operation of general entertainment, whereas as I understand it, these gentlemen operate ballrooms in which ballroom dancing is the main attraction, and not quite secondary.

Q. Is the selling of beverage or any other service as an adjunct to your understanding in respect to furnishing music, is there any difference? A. No.

Q. What states have you played in? Could you name them, as a musician, practical musician in bands?

A. In different orchestras I have played in about six states.

Q. Name them.

A. Alabama, Arkansas, Tennessee, Mississippi, Texas, and Georgia. That is about all.

Q. Now with respect to Cincinnati, that is where you live, isn't it?

[fol. 749] A. That is correct.

Q. You live in the city of Cincinnati?

A. That is true.

Q. You are an official of the Cincinnati Union?

A. That is true.

Q. Is it your business to contact orchestras on their location and contact the men and leaders? A. It is.

Q. Does it not provide in this contract Form B that Union business agents in the exercise of their duties shall have the right to contact the leader and men on duty?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, and not the best evidence, immaterial and irrelevant.

The Court: It is not the best evidence, but the same time you may answer. (Complainants except).

Mr. Charlton: That is the only reason that I am objecting to it, it is incompetent.

A. It does.

Q. In other words, it is part of the duty of the officials, in the capacity of your duties to go around and visit these men and visit these places? A. It is.

Q. You have heard Mr. Bartels describe his estab[fol. 750] lishment. Are there any such establishments in Cincinnati? A. There are.

Q. Are there in Ohio? A. There are.

Q. Were there in the states you traveled around in? A. There were.

Q. In the bands that you placed in the bands in these six states you have mentioned is the general operation of playing and rendering music any different than was described by Mr. Bartels and Mr. Geer in their establishments?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, incompetent, irrelevant and immaterial.

The Court: We will take it subject to the objection. You may answer. (Complainants except).

A. I don't think so.

Q. Now the Union insists that the leaders and orchestras performing musical service shall be on the basis set forth in Form B contract? A. That is true.

Q. Is that the rule of the Union with respect to every traveling band in the country?

Mr. Charlton: Objected to as not the best evidence and calling for the opinion and conclusion of the witness, im-[fol. 751] material and irrelevant.

The Court: I suppose that necessarily follows. You may answer. (Complainants except).

A. It is.

Q. What would happen to a band leader and the members of his band if they refused to obey orders given them respecting their employment by Mr. Geer or Mr. Bartles?

A. Well, the contract could be cancelled for failure to abide by its terms, and under our laws, the laws of the American Federation of Musicians, the employer has equal rights with the musician in appealling to the American Federation of Musicians for adjudication under the contract, so if by the act of the employe the musician, the contract were abrogated the employer could file with the American Federation of Musicians a claim for actual damages under that contract. We have had many such claims of employers.

Q. In other words, where orders were given to the band leader or sidemen which they had refused to do?

A. I would not say that specifically. I would say we have had claims arising from one reason or another. I don't think there have been any where the musicians have refused to obey orders.

Q. And under the Form B contract must he obey orders?

[fol. 752] Mr. Charlton: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion and opinion of the witness.

The Court: You have gone over that. (Intervener excepts).

Q. If a leader or sideman had refused to obey an order given him by the establishment or employer it is your statement that Mr. Bartels or Mr. Geer or the others situated like him could declare the contract terminated?

Mr. Charlton: Objected to as leading and suggestive and repetition.

The Court: We will take it subject to the objection. (Complainants except).

A. Yes.

Q. You heard Mr. Bartels and Mr. Geer state that they gave no orders? A. I did.

Q. Don't answer this question until Mr. Charlton has had a chance to see whether he wants it answered or not: If Mr. Geer as the operator of his establishment, Mr. Bartels, operator of his establishment, had given orders to the persons they employed respecting the character of the music to be rendered, waltzes or two-steps, or modern dances, rhumbas, and as to the number of them to be in-
[fol. 753] terspersed, as to intermissions, as to playing loud or playing soft, as to placement of the musicians, as to mixing with the guests or otherwise, would the members of the American Federation of Musicians and these men employed by Mr. Geer and Mr. Bartels, the leader and sidemen, be obliged to perform, to conform with and obey those orders?

Mr. Charlton: Objected to as not a proper hypothetical question, as calling for the opinion and conclusion of the witness, no proper foundation laid, as suggestive and leading, as immaterial and irrelevant, as pertinent to no issue, and no fact or record in this case.

The Court: It would seem to me argumentative clearly and calling for the opinion of the witness, but I will take it subject to the objection if you want to offer it.

Mr. Padway: Yes.

(Complainants except).

A. The members would have been required to obey all regulatory requests from the employer.

Q. By regulatory requests you mean those which I mentioned?

A. I mean those which you mentioned.

Q. In accordance with the Constitution of the American
[fol. 754] Federation of Musicians here in evidence, 1941, 1942, and you referred to 1944 and the Form B contract, would the band leader of a band employed by Mr. Bartels or Mr. Geer in the manner and at the times they were employed as mentioned by Mr. Geer and Mr. Bartels in court here, be obliged to discharge a sideman upon request of Mr. Bartels and Mr. Geer?

Mr. Charlton: The same objection as previously stated.

The Court: Those are the same questions I sustained the objection to on yesterday, clearly asking this witness' opinion upon the construction of a contract, but I will take the evidence if you insist on it.

Mr. Padway: I would like to take it, if the court please. I understand it is taken subject to objection, and the court can disregard it if it is not material.

(Plaintiffs except).

Q. What is your answer? A. It would be.

Q. You heard it stated yesterday that Mr. Geer on one engagement when the band arrived--Let me reframe that question. You heard it stated yesterday that Mr. Geer, on one occasion when Mr. Moorhead came with his band there was the absence of a piano player. You remember that testimony?

[tol. 755] A. Yes.

Q. You heard it stated that the piano player was employed by the name of—it escapes me—you heard it stated that she played with the band? A. Yes.

Q. But was not a regular member of the band?

A. Yes.

Q. Was it incumbent upon and the duty of Mr. Moorhead to employ her with his band upon the request of Mr. Geer?

Mr. Charlton: The same objection last previously urged, and the further objection that it is assuming facts not in the record.

The Court: It is purely his opinion about it and whether or not it is controlled by contract. You can take it, but it is his opinion. (Complainants except).

A. It was.

Q. Is that the duty of every leader when requested by an employer of an establishment to employ a musician that he names?

Mr. Charlton: The same objection, and may my objection without repetition stand to this line of questions?

The Court: You better put them in.

Mr. Padway: It is only this, if the court please, it is understood that this line of questioning is objected to by [fol. 756] Mr. Charlton to each and every question.

Mr. Charlton: And on the ground last stated in, the previously stated objected.

Mr. Padway: Even though I am putting that on the grounds, I am making the record to show it on the ground or question of control, that is what I am after.

The Court: Of course I understand you cannot control some other court unless you want to make an agreement with the reporter to put in the objections.

Mr. Padway: Let the reporter note an objection to each and all these questions as having been made by Mr Charlton.

A. Yes.

Q. It would be the duty with all leaders?

Mr. Charlton: The same objection.

The Court: Put in my ruling under that agreement that it is taken subject to the objection. (Complainants except).

Mr. Padway: That is right.

Q. Mr. Hild, I am offering to put this question and I know what is going to happen to me. Does the Federation have any purpose in pressing the subject of who is employe and who is employer, and its relationship to the tax, social security tax?

[fol. 757] A. Yes, it has.

Q. What is that purpose?

Mr. Charlton: Objected to as immaterial and irrelevant, calling for a conclusion and opinion of the witness and hearsay.

Mr. Padway: I won't disagree with you on that at all, but if you will let me put it in, I think that is argumentative.

The Court: That is worse than argumentative. (Interveners except).

Q. Going back to the line of questioning that has been objected to and taken subject to the objection, I would like to ask you a few things. I asked you about the seating arrangement, that was included in my question and your answer. Then I asked you about playing more loudly and softly; I don't know whether I included in that faster or slower, would the same answer be there, that they would have to take these orders from the establishment?

Mr. Charlton: The same objection.

The Court: We will take it subject to the objection. (Complainants except).

A. Yes.

Q. Did I ask you about mingling or not mingling with [fol. 758] the patrons, that was up entirely to the establishment?

Mr. Charlton: Same objection.

The Court: The same ruling. (Complainants except).

A. It is.

Q. And Mr. Charlton and Mr. Roberts, I asked the witness yesterday respecting the use of loud speakers, and that the band leaders brought loud speakers, and in one instance Mr. Geer, I think, had his own loud speaker, and both were used. What is the fact as to whether the control of the loud speaker and the use of it within the establishment, may it give an order respecting the use of it or lack of use of it?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except).

A. Yes, it may.

Q. It is entirely up to them whether it will be used or not?

Mr. Charlton: The same objection

The Court: The same ruling. (Complainants except).

A. Yes.

Q. From what you heard of them, I say the band leaders do carry loud speakers with them.

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except).

A. That is a holdover from the dance not so long ago [fol. 759] when loud speakers were not general equipment in rooms in which music played, so as a matter of convenience to everyone where the convenience has not been installed, they carry loud speakers. Today most of the establishments have a loud speaker system put in their quarters.

Q. They could very well get along without the loud speaker with the band?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except).

A. Yes, they could.

Q. If the employer, or Mr. Geer or Mr. Bartels decided to make out separate checks to the sidemen, and have the leader distribute them, would he be allowed to do that in that form?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, and the witness not shown qualified, and speculative, and no proper foundation laid, immaterial and irrelevant.

The Court: I will take it subject to the objection. (Complainants except).

A. He would be.

Q. In other words, within the contract figures, if a list were handed to the leader and the establishment said to write out the checks in the amounts and names, the leader [fol. 760] would have to distribute them in that manner?

Mr. Charlton: The same objection, and invading the province of the court.

The Court: The same ruling. (Complainants except.)

Q. You heard it said here about uniforms, that the men furnish their own uniforms; is that the custom in the United States that bands that travel with sidemen, that the band-leader and the sidemen bring their own uniforms?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Yes, it is.

Q. As a man who has played in a band, would it be possible, owing to the short duration or short engagements, to handle the subject of uniforms otherwise?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Scarcely possible.

Q. They could not?

Mr. Charlton: Same objection.

The Court: The same ruling. (Complainants except.)

[fol. 761] A. No.

Q. Respecting rehearsals, bands do have to rehearse from time to time where there are new members or in fact where there are old members, don't they?

A. Yes.

Q. Does the establishment have the right to control and direct the rehearsal and where they shall be had and fix the place?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Yes.

Q. And is it done by establishments?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. It is done frequently.

Q. Establishments, it was testified often had other attractions which are outside of the musical field, acts as we call them, vaudeville acts, and matters of that kind?

Mr. Charlton: Objected to as immaterial and irrelevant and not in the record.

Mr. Pidway: You brought it out.

Mr. Charlton: I did know of these acts.

Q. These bands operating in the manner that the bands did as brought out by Mr. Bartels and Mr. Geer, playing

[fol. 762] music with attractions purchased or contracted by the establishment, you know that to be a fact from your own knowledge as a musician?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Yes, sir.

Q. In such instances are the bands often required to rehearse with these attractions?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Especially with the attractions.

Q. Are the leaders and musicians of the American Federation obliged to accept orders respecting these rehearsals from the establishment?

Mr. Charlton: Objected to as having no bearing upon the issues in this case, calling for the opinion and conclusion of the witness, and leading and suggestive.

The Court: We will take it subject to the objection. (Complainants except.)

A. They are subject to the orders of the establishment.

Q. Now there is one or two other questions, and I think I am through. These questions that I have asked you, or at least I intended, were in connection with traveling bands; what is the fact as to whether there are other bands than [fol. 763] traveling bands, bands on location?

A. There are bands composed of members of the American Federation of Musicians who prefer to remain in one town because of families and personal connections rather than travel on the road. There is no difference in the manner of rendition of service as between a traveling band, so-called, and a local band, so-called.

Q. They too must operate under B Form contract?

Mr. Charlton: The same objection.

The Court: The same ruling. (Complainants except.)

A. Yes.

Q. What would you say with respect to the size of those generally, large bands or small?

A. In general the bands which remain in one locality are smaller bands than those which travel, as a general rule.

Q. What would you say as to whether they are in number, seven or less, would the larger proportion be seven or less?

A. The larger proportion would be seven or less.

Q. Have you any idea as to how many such bands there are in the country?

Mr. Charlton: Objected to as immaterial and irrelevant, and having no bearing on any issue of fact in this case.

[fol. 764] The Court: It certainly is not, but we will take it subject to the objection. (Complainants except.)

A. It would be difficult to even estimate the number of such bands because they are not subject to national regulation as are traveling bands in the same sense that we do not have the information available from various and sundry reports made to us.

Q. You do not have the number?

A. I don't know.

Q. Would it be fair to say that in the United States almost any community of any size of 10,000 or above might have one of those bands?

Mr. Charlton: The same objection.

The Court: We do not have to go into the "mights," do we? I can take it if you want it, subject to the objection. (Complainants except.)

A. I think that might be true.

Q. What would you say from your experience traveling around, have you found bands of that nature, you personally?

Mr. Charlton: The same objection.

The Court: The same record. (Complainants except.)

A. Yes.

[fol. 765] The Court: Do you have any que tions to ask, Mr. Cohen?

Mr. Cohen: I have a few questions I would like to ask him but I thought I would wait until Mr. Charlton was through.

Mr. Charlton: I prefer that you go ahead.

The Court: You are now adopting this man as your witness?

Mr. Cohen: No, this is cross-examination. He is not our witness.

Mr. Charlton: If the court please, I don't believe we are required to consent or assent to the parties appearing as having a community of interest, either of them to consider themselves as in a position of a cross-examiner.

The Court: You are right about that.

Mr. Cohen: As I understand the examination involved was made by the interveners.

The Court: And they joined in your position and raised exactly the same question and concurred in every thing that you had done. Now you cannot make them adverse to you. If that is the question of whether you have the right to cross-examine this witness I will be glad to rule on it. It does [fol. 766] not make much difference. I am not saying you haven't the right to examine, but I am saying you cannot use the rules of cross-examination in forming your questions. (Defendant excepts.)

Examination By Mr. Harold B. Cohen:

Q. Will you state what your position in the American Federation of Musicians was during 1941 and 1942 at the time of the engagement in question which I believe you mentioned on direct?

A. I was a member of the International Executive Board of the American Federation of Musicians.

Q. Now in connection with your position did you have occasion to sit as a member of the Board in disciplining members for infractions of the rules and regulations?

A. I did have.

Q. Was it within your province to interpret the By-Laws, Constitution, rules and regulations of the American Federation of Musicians in 1941 and 1942 for that purpose?

A. It was.

Q. So that you are familiar with the interpretation placed upon the Constitution, By-Laws, rules and regulations of the A.F.M. during those years, is that correct?

A. I am.

[fol. 767] Q. You are also familiar with the Form B contracts which are in evidence in this case?

A. I am.

Q. Now are you able to tell the court whether from your knowledge of the interpretations placed by the Union upon its Constitution, By-Laws, Rules and Regulations, that there is anything in the Constitution, By-Laws, Rules and Regulations which is at variance with or inconsistent with any of the terms of Form B contract?

Mr. Charlton: Does that call for a yes or no answer?

Mr. Cohen: Yes.

A. No.

Q. Are you able to state whether—Read the question.

(Question read by the reporter.)

Q. Are you able to state? A. Yes.

Q. Will you state whether there was any such inconsistency in 1941 and 1942?

Mr. Charlton: Objected to as invading the province of the court, as calling for a conclusion and opinion of the witness, not only his own but also a tremendous organization, as immaterial and irrelevant, no proper foundation laid in the testimony, the witness not shown qualified and not the best evidence.

[fol. 768] Mr. Cohen: I would be willing to go further into his qualifications, if necessary. I thought I would qualify the witness from his own official position as a member of the Board which passes upon these regulations as being able to state what the official interpretation of the Constitution, By-Laws and regulations were during this period. It is my understanding that so far as the Union or other association of that kind is concerned where it has certain laws or regulations, if the laws are not sufficient without interpretation placed upon them by that body, and in order to determine whether there is any variance with the regulations made in any senior parent body, to have an interpretation placed by the officials of the Union.

The Court: I will take it subject to the objection. (Plaintiffs except.)

A. No, there was nothing deemed contrary to these contracts.

Mr. Cohen: No further questions.

The Court: Now we are ready for the cross-examination by the plaintiffs. All right, Mr. Charlton.

Cross-Examination.

By Mr. Clyde B. Charlton:

Q. I believe you testified you were one of the high officers of this Union?

[fol. 769] A. I testified that I was a member of the International Executive Board of the Federation.

Q. You are not a lawyer? A. I am not.

Q. The meeting of the International Executive Board at Miami was held late in January, '41?

A. Beginning late in January, that is right.

Q. And continued until February?

A. That is correct.

Q. That meeting was a regular annual affair, was it not? A. Semi-annual.

Q. There, all the members present? A. Yes.

Q. Now the members of the International Executive Board are the president? A. Yes.

Q. Vice-president? A. Yes.

Q. Secretary? A. Yes.

Q. Financial secretary and treasurer? A. Yes.

Q. And the members of the Executive Committee?

A. Yes.

[fol. 770] Q. And it is a fact, as a member of the Executive Committee that you become ipso facto a member of the International Executive Board, is it not?

A. That is true.

Q. Did Mr. Padway attend those sessions? A. No.

Q. Mr. Cohen, of course, was not there? A. No.

Q. Neither was Mr. Wilson? A. No.

Q. Are those so-called semi-annual sessions play meetings, or do you really work?

A. We work about eight hours a day.

Q. You attended all those meetings? A. Yes.

Q. And Petrillo attended all those meetings? A. Yes.

Q. Petrillo was there at all of those meetings?

A. Yes.

Q. The secretary attended all the meetings?

A. Yes.

Q. You came here to Des Moines for the purpose of testifying for the Union in relation to what happened at those meetings, didn't you?

A. I did not. I came here as an observer because I am [fol. 771] inherently interested in this question. It was only after I was here that Mr. Padway asked me whether I would go on the witness stand and I agreed; but I am here at my own expense, I might add, as an individual, and primarily as an observer.

Mr. Charlton: I don't think it makes much difference, but I move to strike the last statement of the witness as voluntary and not responsive to any question asked.

The Court: I think it was. (Plaintiffs except).

Q. You claim to be fully informed as to what took place at those sessions? A. I do.

Q. Now the International Executive Board is the highest ranking authority except only the President of your Union, is it not? A. Yes.

Q. Now I think you testified that a full discussion was had on the matter of revision or preparation or devising of the Form B contract during the February and January, 1941 session? A. Of a form of contract.

Q. You were present during all of those discussions?

A. I was.

[fol. 772] Q. Those discussions were in the nature of an advisory discussion resulting from Petrillo laying the matter before the International Executive Board for discussion and advice? A. That is correct.

Q. Mr. Petrillo does ask your advice on some things?

A. He does.

Q. You do not claim the International Board took any formal action or gave any formal order or direction to Petrillo on this matter?

A. The International Executive Board adopted Form B contract, and instructed Petrillo to formulate the necessary verbage, formulate the necessary laws, formulate the necessary instructions to our people regarding its use and its adoption.

Q. You use the word "instruction." You stated, I think, on direct examination that your Board did not have the power to take any action with respect to the By-Laws or the laws, is that correct?

A. That is true, but the Executive Board has the right to instruct its officers.

Q. Upon their request? A. Upon whose request?

Q. Upon the officers' request?

[fol. 773] A. No, not upon request, contrary to common opinion.

Q. Now in the Musicians Union the By-Laws are commonly referred to as laws? A. That is right.

Q. I think you said that in the course of the discussions it was mentioned that it had been contended in court or somewhere that Section 29 of Article X of the By-Laws prohibited the Union members from being employes of establishments, or had been so contended?

A. Yes, there was a question put to me regarding such contention.

Q. Your sessions there at Miami was not called for the purpose of a general revision of your By-Laws, was it?

A. No.

Q. As I understand it, your Executive Board took some kind of action recommending something be done with respect to Section 29, Article X of the By-Laws?

A. Not specifically at that time. The Executive Board took action to adopt a contract, and took corresponding action instructing Petrillo to formulate the necessary changes, and adopt the necessary changes under his authority to bring about the action in adopting this contract to make it a certainty so far as its use and adoption by members is concerned.

[fol. 774] Q. Section 29, Article X, was the only By-Law mentioned in that connection?

A. Section 29, Article X, specified the general nature of conducting the business as between musicians and employers, yes.

Q. That is the one that you talked about and had in mind, is that correct? A. Yes.

Q. Now don't you keep any record as to what your International Executive Board does in its sessions?

A. I don't the secretary does.

Q. A record was made of each of those actions that you talked about here? A. It should have been.

Q. Your By-Laws require the secretary to make a record? A. Yes.

Q. The secretary is supposed to keep those records and not destroy them, isn't he? A. I think so.

Q. You know there is a complete written record of whatever the action was that you took in the way of recommending action or instructing that action be taken, don't you?

A. I don't think there is any transcript, if that is what you mean. I think there are notations made of what hap- [fol. 775] pened. The fact is I some times do receive those. I do not receive those notes and condensation of the minutes regularly. That was not the policy then, however.

Q. You know that the By-Laws of the Musicians Union require the secretary to make and cause to be signed either by himself or by the president, a record of every formal act that is taken, don't you?

A. I would think a good secretary would do that anyway.

Q. You know that the By-Laws require that?

A. I imagine that the By-Laws require that.

Q. There was, so you testified, an instruction or direction that went out from the Board to Petrillo, was there?

A. Didn't go out from the Board to Petrillo. The Board sitting in session over a number of days this matter was discussed and by motion Petrillo was instructed to accomplish these things that I have mentioned.

Q. Did you pass motions without making a record of them?

A. I never make the record myself.

Q. Does your Executive Board make and pass motions without having the secretary make the record of it?

A. No. I think the secretary sits there and makes constant notes. What he makes I am not familiar with.

Q. You did not have in mind testifying on this matter [fol. 776] when you came to Des Moines, did you?

A. No.

Q. Those sessions occurred nearly four years ago, did they? A. Yes.

Q. Do you think your secretary's written record would be as good as your memory on the matter of what that motion was?

A. I think his record and his memory would be as good as mine.

Q. It would be better, would it not?

A. It might be.

Q. Did you bring with you the secretary's minutes or record of that motion? A. I had no reason to.

Q. You did not expect to testify? A. I did not.

Q. You do not recall that anyone presented to you at any time during your sessions there the language of any revised By-Law, do you? A. No.

Q. That was your best recollection that the talk was about revision, wasn't it? A. It was.

Q. Of one or more By-Laws?

[fol. 777] A. It was.

Q. Do you recall when the session adjourned or was finished?

A. You mean the entire Board meeting?

Q. Yes.

A. I recall this much. It happens that my birthday is February 15th, and on February 15th I boarded a train to return to Cincinnati. I had my family with me and I may have stayed two or three days beyond the Board meeting. I don't know, that is all I know.

Q. At any rate, it was concluded on or prior to February 15, 1941? A. That is correct.

Q. Now, Mr. Hild, will you kindly carefully consider the next question because I want you to be sure to understand it: Do you or do you not claim that Petrillo prepared a written order which referred by its terms to a section of the By-Laws and revised or changed it?

A. I should say yes.

Q. The answer is yes?

A. The answer is yes.

Q. You have that written order? Strike that. You understand that question inquires concerning a written order which refers by its terms to one or more By-Laws which were purported to be revised or changed?

[fol. 778] A. Yes, I understand so.

Q. Do you have that order? A. I do not.

Q. Is it here in Des Moines?

A. Not that I know of.

Q. You understand that question used the word "written"? A. I understand.

Q. The secretary would have that, wouldn't he?

A. He might have.

Mr. Charlton: I am perfectly aware that a motion to strike is in order, but I desire to continue the examination on other lines.

Q. Now then in that connection and in those sessions there was a lot of discussion of a new form contract, wasn't there? A. There was.

Q. Those discussions indicated, or it was stated in those discussions, that the form of contract which was being discussed was one that would be generally used by musicians everywhere? A. Yes.

Q. Radio industry? A. Yes.

Q. Movie industry?

[fol. 779] A. Yes.

Q. Entertainment world?

A. Yes. We contemplated everything except symphony orchestra.

Q. Now then did Petrillo, or anyone, in those meetings assert that action with reference to a By-Law was urgent because it had just been discovered that twenty-five or thirty years ago most of the states enacted Workmen's Compensation Acts? A. Yes, that was discussed.

Q. Was it recognized that Workmen's Compensation laws had been on the statute books of the states for twenty-five or thirty years generally?

A. Yes, I think that was discussed.

Q. Was that a recent discovery of your Board that those laws were in effect? A. I think so.

Q. You had not learned about that previously?

A. They had not been cognizant of that, at least.

Q. The recent discovery that those laws had gone into effect was stated as part of the reason for the urgency of taking action?

A. I would not say the recent discovery that they had gone into effect, but the recent discovery of the failure of [fol. 780] many of our people to obtain benefits thereunder was under discussion.

Q. No one claimed or stated that there had been any recent change in any of those laws? A. No.

Q. Now did Petrillo, or anyone, assert in those discussions that action with reference to a By Law was urgent because it had been discovered that one hundred or so years ago the common law had developed the principle of respondeat superior?

A. Will you please put it in different language?

Q. Respondeat superior is the responsibility of the masters for the servants?

A. Yes, I believe even such subject was discussed. We have a few lawyers on the Board and they some times become very technical in their language also.

Q. Was it suggested as one of the reasons for agency?

A. No.

Q. You talked a lot about social security and unemployment advantages during those discussions, didn't you?

A. Yes.

Q. You heard and were told that Petrillo had made three separate trips to the Treasury Department for the purpose of discussing the proposed form of contract with [fol. 781] that department with reference to social security tax? A. No, I did not.

Q. You never heard that in those discussions?

A. No.

Q. In Petrillo's letter to the membership published in the Musicians Union—International Musician publication said that he made such trips, would you think it was true?

A. Prior to the Board meeting?

Q. Yes.

A. If he published it and said so I would say it was true.

Q. Well, if he did it and published it afterward, you would say it was true? A. I would say it was true.

Q. Don't you recall that an issue of the International Musician was devoted in several of its pages to an explanation of the excellent job which had been done in preparing to change the rule as to social security tax burden?

A. I don't recall any such statement with reference to the excellent job that was done. I remember many, many articles on the matter of explanation to our people as to what they should do and what they must do.

Q. The International Musician is the official publica-
[fol. 782] tion of your Union, is it not?

A. Yes, sir.

Q. So made by your By-Laws and Constitution?

A. Yes.

Q. Its publication is supervised by the secretary, is it not? A. That is correct.

Q. The secretary edits it, doesn't he?

A. That is right.

Q. That is the same secretary that sits on your International Executive Board meetings?

A. Yes, it [it].

Recess: 10:45 — 11:00 a. m.

The witness Hild resumed the stand for further cross-examination by Mr. Clyde B. Charlton:

Mr. Charlton: Your Honor and counsel, I am going to refer to some three pages of this May 1941 issue of the International Musician. I suppose perhaps the best is to mark those three pages.

Mr. Padway: Why not mark it and refer to the pages?

Mr. Charlton: You waive all objections?

Mr. Padway: Yes. We make no objection to that.

[fol. 783] Q. Mr. Hild, I hand you Exhibit B-37. You find that to be the May 1941 issue of the International Musician, do you not? A. I do.

Q. You find a big type headline across the top of that first page of the issue? A. I do.

Q. Will you kindly read it?

A. "Internal Revenue Department Decides For The Federation. Standard Federation Contract Which Construes Leaders As Employes Receives Department Approval."

Q. Do you find most of the first page of that issue is devoted to the printing of a letter which is concluded on page 18 of that issue purporting to have been issued and signed by Petrillo? A. Yes, sir.

Q. Referring now to the first page of that issue, and that letter, do you find that in that letter Mr. Petrillo advised that in 1940, in the month of November, I believe, he had a conference with the Treasury Department with reference to a form of contract which would be accepted by the Department as sufficient evidence of the establishment of musicians? A. No, I don't find that.

[fol. 784] Mr. Padway: Objected to as not the best evidence.

Q. I will have you read the recital in the rest of that letter for the record in reference to a 1940 conference?

A. "On November 19, 1940, Attorney Ansell, Thomas Gamble (my first assistant), and myself had a meeting with the Treasury Department attorneys in Washington, D. C. At this conference we discussed the question as to who was to be recognized as employer in a restaurant, cafe, hotel, etc., the contractor on the job, the leader, or the man who owns the establishment." Is that sufficient?

Q. Do you find a further recital "We had a very fine conference during which this matter was discussed from every angle," do you not? A. Yes.

Q. Further on in the article do you find a reference to a special discussion of the Executive Board meeting concerning the contract? A. Yes.

Q. And for the record what does Mr. Petrillo's letter say about that?

A. "The Committee then met on January 23, 1941, in Miami, Florida. (Four days prior to the meeting of the Executive Board for its mid-winter conference on January 27th)." By the Committee he refers to a different meet-[fol. 785] ing than a Special Committee. I am not sure. I have not read the article. "And discussed the contract pro and con, making such further changes as seemed advisable until finally it was in such shape that we could present it to the entire Executive Board, further discussions of the contract taking place when the Board meets at a whole. The contract was finally adopted unanimously."

Q. Now then just following the matter which you have finished reading, do you find a reference to a trip to Washington to confer with the Treasury Department?

A. Yes.

Q. What does Petrillo's letter say about that, for the record?

A. "Thereupon I made an appointment with the Treasury Department in Washington. I left the Executive Board meeting and went to Washington together with General Ansell and on January 31st we presented the contract which we felt convinced would be thought satisfactory to everyone concerned."

Q. In the second following paragraph do you find a reference to an additional conference between Mr. Petrillo and the Treasury Department at Washington?

A. The second following paragraph?

[fol. 786] Q. Yes.

A. No. Oh, I see. Yes.

Q. That was a Monday morning meeting, I think, according to this letter, was it not? A. I think so.

Q. What does he state concerning that Monday morning meeting?

A. "At the close of this conference I asked the Treasury Department whether it would not be best for them to meef with our attorney on the following Monday in order that there might be no misunderstanding concerning the changes made and they agreed to do so. I advised Mr. Ansell that when he was through with the Treasury Department to again return to Miami where the Board was still in session, because it was the wish of the entire Board that this contract be definitely disposed of before the Florida session adjourned. This the attorney did, at which time the contract was again discussed. One or two further minor changes were made. The Executive Board then passed a motion that the contract be referred to our Technical Adviser, Mr. Weber, and Attorney Ansell to discuss still further, while the Board and myself remained in executive session. Following the discussion between Messrs. Weber and Ansell the contract was brought back to the Board. The Board after due consideration, approved the contract [fol. 787] form and referred it back to the sub-committee for such further action as might become necessary in the interests of the Federation."

Q. Now, Mr. Hild, you do not find any reference in Mr. Petrillo's letter to any By-Law changes, do you? A. No.

Q. Does the reading of that letter refresh your recollection to the extent that you can now say that you recall that three different conferences by Petrillo with the Treasury Department were reported to your Executive Board?

A. I think I recalled that before, but I believe your question involved conferences prior to the discussion by the Board. May I go on and elaborate on the answer?

Q. I don't think the question calls for any elaboration. I don't want to shut you off, but I don't think it calls for it.

Mr. Padway: Go on and explain.

A. As evidenced by this article itself which was not read here. There were prior meetings. There was a prior meeting in October in Chicago in which the matter of uniform adopting of contracts first came up for discussion.

That is what I had lost track of, and was of the impression the first discussion occurred in Miami. The first discussion [fol. 788] occurred at the Board Meeting in Chicago.

Q. In other words, you confused the two Board meetings? A. Yes.

Q. At that Miami meeting you were told discussion had been had with the Treasury Department relative to Form B contract?

A. Not relative to Form B contract, relative to clarifying the status of musicians under the social legislation.

Q. Now then did anyone in those meetings raise any question as to whether the Treasury Department under its rules then in force was required to consider the true facts of the relationship as established by all of the facts surrounding the relationship before a determination could be made as to who the employer is in any situation?

A. Yes.

Q. That was mentioned, was it? A. Yes.

Q. Mr. Petrillo does not mention it in his article, does he? A. Apparently not.

Q. On page 18, which is the page to which the front page article is continued, the front page letter of the issue [fol. 789] of the International Musician you find an order of Petrillo, do you not?

A. I don't find it. Can you direct my attention to it? There are a number of columns here.

Q. That line (indicating). A. Yes.

Q. Will you read that order at the end of Mr. Petrillo's letter?

A. "Members are therefore advised that on and after June 1, 1941, all members of the Federation must sign contracts for all engagements, traveling or local, on this contract form and none other.

"The licensed booking agencies will also be required to use this contract form. Members must refuse to play any engagement if the engagement is contracted on any other form after May 31, 1941.

"Kindly be governed accordingly.

"Fraternally yours, James C. Petrillo, President."

Q. That order does not refer to a By-Law of the Union, does it, by its terms? A. No.

Q. Just ahead of the part which you read at the close of Mr. Petrillo's letter in this issue, there appears a full copy of Form B contract; is that correct?

[fol. 790] A. Yes.

Q. What is known in this record as Form B contract?

A. Yes.

Q. In this same letter Mr. Petrillo sets forth a letter, and copy of a letter addressed by him to the Commissioner of Internal Revenue asking for a ruling on that contract, does he not? A. Yes, it does appear that.

Q. You recall that from information in that discussion there at Miami?

A. No, I recall it from the circumstances which followed.

Q. You mean you discussed this matter and did not talk about the planning of that letter?

Mr. Padway: Look at the date. It would be impossible.

A. No, that letter was not planned there.

Q. You know that letter was sent to the Commissioner of Internal Revenue, do you not?

A. I know it only because of the final decisions in which he declined to make a reply to Petrillo direct.

Q. Then you know it, don't you? A. Yes.

Q. Did that letter make any reference to any other fact or circumstance other than the contract?

A. No, the letter presupposes that the letter is sub- [fol. 791] mitted as his own document.

Q. Mr. Petrillo published a letter to the membership also setting forth a ruling obtained by the leader of the orchestra referred to in his letter to the Department, does he not? A. Yes.

Q. And it refers to the ruling being made upon Mr. Petrillo's request? A. It does.

Q. Is that ruling letter referring to any fact or circumstance other than the Form B contract as pertaining to engagements and the determination of the fact there determined?

A. No, it refers to the contract only.

Q. I ask you now to examine page 24 of the May, 1941 issue of the Official Journal of the Musicians Union; do you find there printed what purports to be a copy of an order of the Executive Board of the Union?

A. Yes.

Q. Is that the order that you mentioned in your examination as issued by the Executive Board in connection with this whole matter?

A. There was no order of the Executive Board in connection with the whole matter. I said, I think, that the [fol. 792] Executive Board, which is always attended by the President is one thing, and the President who is not always surrounded with the Executive Board is another thing, and therefore, under our laws, the right to change and alter and amend laws rests with the President with the understanding, however, that whether the Board first or not, such changes are always submitted to the Board in their meeting.

Q. All right. Will you tell me whether that is the order that I referred to in your testimony earlier today is an order made by the Executive Board?

A. I am sorry. I don't believe I said that an order was made by the Executive Board. I said Mr. Petrillo was instructed to accomplish that which was necessary and this was his version of what was necessary.

Q. And that was done?

A. Yes, that is true.

Q. Did you find at the beginning of this publication of the order the words "By order of the International Executive Board the following notice was sent to all Locals of the American Federation of Musicians on May 1, 1941"?

A. Yes, I see that.

Q. Was such an order issued by the Executive Board?

A. Yes, I believe we said to the President, or instructed [fol. 793] the President to notify the Musicians and members accordingly.

Q. But the recital here that the order was issued by the Board is not, in your opinion, correct?

A. Of the very language in that notice. In other words, I don't think the actual notice was ever submitted to the Board.

Q. The orders of the Board are such as Petrillo prepares subsequent to your taking action. Is that the normal practice?

A. We, the Executive members live in widely scattered parts of the United States and Canada. It is not too frequent we get together, some six or eight times a year. As a consequence of that phase of our membership on the Executive Board we frequently direct him to do a certain thing, and he in connection with the secretary who is close by, formulate the actual language and follow out the instruction.

Q. Now then, at the beginning of what the Official Publication says was the Board's order, there appears a letter, another letter signed by James C. Petrillo, is there not?

A. Another letter? That is the same letter we are speaking of, is it not?

[fol. 794] Q. No, it is not the same.

A. All right. There is a letter signed by Petrillo and the secretary.

Q. Will you read that for the record?

A. "To all Locals of the American Federation of Musicians:

"Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with grand opera companies and symphony orchestras.

"This contract is the one which has been adopted by the International Executive Board for the purpose of protecting our members under the social security laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

"This contract and none other must be used on all such engagements on and after June 1, 1941. * * *"

Q. Signed "James C. Petrillo"?

A. Yes.

Q. Now then at the end of what the Official Journal of the Union sets forth as the Executive Board's order, do you find a paragraph having to do with instructions to the officers of Locals? A. Yes, I do.

[fol. 795-97] Q. What is that paragraph, for the record?

A. "All officers of Locals and all members are required to adhere strictly to this order, as this is the only means by which we can help protect the interests of the members under the Social Security Laws of the United States."

Mr. Charlton: The plaintiffs offer in evidence plaintiffs Exhibit B-37, and particularly pages 1, 18 and 24.

Mr. Padway: No objection.

Mr. Cohen: No objection.

The Court: Admitted.

Plaintiffs' Exhibit B-37.
Filed in U. S. District Court December 13, 1944.

INTERNATIONAL MUSICIAN

OFFICIAL • JOURNAL • AMERICAN • FEDERATION • OF • MUSICIANS

VOL. XXXIX NEWARK, N. J., MAY, 1941 NO. 11

INTERNAL REVENUE DEPARTMENT DECIDES FOR THE FEDERATION

Standard Federation Contract Which Construes Leaders as EMPLOYEES Receives Department Approval

New Form Adopted Must Be Used On All Engagements Effective June 1st

On November 19, 1940, Attorney Ansell, Thomas Gamble (my first assistant) and myself had a meeting with the Treasury Department's attorneys in Washington, D. C. At this conference we discussed the question as to who was to be recognized as employer in a restaurant, cafe, hotel, etc., the contractor on the job, the leader, or the man who owns the establishment.

Of course you well know that the American Federation of Musicians has always contended that the real employer of the then passed a motion that the contract be referred to our Technical Adviser, Mr. Weber, and Attorney Ansell to discuss still further, while the Board and myself remained in executive session. Following the discussion between Messrs. Weber and Ansell the contract was brought back to the Board. The Board after due consideration, approved the contract form and referred it back to the sub-committee for such further action as might become necessary in the interests of the Federation.

Meantime, the Executive Board had instructed the President to have the present contract signed by two orchestras and two employers somewhere in the United States. Now, while the contract was to

[redacted]

SOLOISTS WHO HAVE JOINED FEDERATION

Unionization Goes Forward at Full Speed Following Two Court Decisions in AGMA Case.

In the April issue of the INTERNATIONAL MUSICIAN President Petrillo's report contained a list of soloists who had joined the Federation subsequent to the decision of the Appellate Division of the Supreme Court of New York.

The organization of these musicians has continued and the following instrumentalists have become members in the interim:

Mischa Elman, violinist.
Ossy Renardy, violinist.
Anatol Kaminsky, violinist.
Ruggero Astolfi, violinist.
Ruggiero Ricci, violinist.
Robert Ostrowsky, violinist.
Percy Grainger, pianist, composer, conductor.
Bruno Walter, conductor.
Eugene Goossens, conductor.
Eric Leinsdorf, conductor, Metropolitan Opera.
Ettore Panizza, conductor, Metropolitan Opera.
Gennaro Papi, conductor, Metropolitan Opera.

the job, the leader, or the man who owns the establishment.

Of course you well know that the American Federation of Musicians has always contended that the real employer of the musicians is the man who owns the establishment.

We had a very fine conference during which this matter was discussed from every angle.

Following this conference, it became necessary that I call a special Executive Board meeting. This I promptly did. The meeting was held at the Palmer House in Chicago, Ill., on December 5, 1940, and adjourned December 6, 1940.

At this meeting the Executive Board instructed Attorney Ansell to draft a standardized contract which might meet with the approval of the Treasury Department. The Board also instructed the President to appoint a committee of four, consisting of our Technical Adviser, Joseph N. Weber, Secretary Fred W. Birnbach, Treasurer Harry Brenton and myself, to go into this contract after it was drafted by the attorney. Shortly thereafter this contract was submitted by Attorney Ansell to the committee which in turn made certain suggestions and amendments to same. Technical Adviser Weber then requested that he be permitted to redraft the contract, in accordance with the suggestions and amendments made by Attorney Ansell and the committee, and re-submit same to Attorney Ansell and the committee. I approved of this request.

The committee then met on January 23, 1941, in Miami, Fla. (four days prior to the meeting of the Executive Board for its mid-winter conference on January 27th), and discussed the contract pro and con, making such further changes as seemed advisable, until finally it was in such shape that we could present it to the entire Executive Board, further discussions of the contract taking place when the Board meet as a whole. The contract was finally adopted unanimously.

Thereupon I made an appointment with the Treasury Department in Washington. I left the Executive Board meeting and went to Washington together with General Ansell and on January 31st we presented the contract which we felt convinced would be thought satisfactory to everyone concerned.

We discussed the entire contract with the attorneys at the Treasury Department, the result being that a few minor changes were suggested and agreed to.

At the close of this conference I asked the Treasury Department whether it would not be best for them to meet with our attorney on the following Monday in order that there might be no misunderstanding concerning the changes made and they agreed to do so. I advised Mr. Ansell that when he was through with the Treasury Department to again return to Miami, where the Board was still in session, because it was the wish of the entire Board that this contract be definitely disposed of before the Florida session adjourned. This the attorney did, at which time the contract was again discussed. One or two further minor changes were made. The Executive Board go back to the committee for further changes, the Treasury Department and the Federation were anxious to have the entire matter settled. I, therefore, took the contract in its present form and had it signed in Chicago between the Stevens Hotel and Ray Heatherton, leader of a traveling band scheduled to begin an engagement at this hotel on March 1, 1941.

I also had a contract signed between Michael Todd's Theatre Cafe in Chicago and Les Brown, an orchestra leader, this job starting on February 21, 1941.

On February 20, 1941, I addressed the

(Continued on Page Eighteen)

ALBERT SPALDING—GREAT AMERICAN VIOLINIST

Eric Leinsdorf, conductor, Metropolitan Opera.
Ettore Panizza, conductor, Metropolitan Opera.
Gennaro Papi, conductor, Metropolitan Opera.
Paul Boepple, conductor.
Herman Busch, cellist, Busch String Quartette.
Adolf Busch, violinist, Busch String Quartette.
Karl Doktor, viola, Busch String Quartette.
Gosta Andreasson, violinist, Busch String Quartette.
Erno Balogh, pianist, composer.
Ania Dorfmann, pianist.
Paul Wittgenstein, pianist.
Otto Herz, pianist.
Jeanne Behrend, pianist.
Ellen Ballon, pianist.
Betty Humby, pianist.
Frederick Bristol, pianist.
Consuelo Flowerton, pianist.
Frances Hall (Gruen), pianist.
Mikhail B. Sheyne, pianist.
Karl Inwald, pianist.
Edwin Ziegler, pianist.
Antal Dorati, pianist.
Max Silber, pianist.
Charles Haubiel, pianist.
Otello Ceroni, pianist.
Harry Kaufman, pianist.
Carlos Chavez, composer, conductor, pianist, who is not a citizen of the United States, has been given a one-year permit which expires on April 22, 1942.

For the benefit of those members who overlooked the list in the April issue of the INTERNATIONAL MUSICIAN, we are reprinting it hereunder.

Musicians Who Have Joined The American Federation of Musicians

Jose Iturbi, pianist and symphony conductor.
Eugene List, pianist.
Efrem Zimbalist, violinist.
Vladimir Sokoloff, accompanist for Zimbalist.
Marjorie Edwards, violinist.
Stevenson L. Barrett, accompanist for Miss Edwards.
Victor Granados, cellist and composer.
Rene Le Roy, flutist.
Oscar Straus, composer.
Robert Casadesus, pianist.
Egor Petri, pianist.
Paul Ulinofsky, accompanist for Lotte Lehmann.
Jacques Abrams, violinist.
Bernard Frank, accompanist on Judson Staff.
Guy Maier, pianist, lecturer.
Albert Spalding, violinist.
Andre Benoist, accompanist for Albert Spalding.
Bartlett and Robertson, duo pianists.

(Continued on Page Thirty-two)

Plaintiffs' Exhibit B-37.
Filed in U. S. District Court December 13, 1944.

orchestra, picked her wedding day before the company went on tour. Her husband, Nino Ruisi, an American basso of Italian parentage, is now filling professional engagements in Cuba. The final member of the trio, Irene Jessner, became Mrs. Arthur von Norby a few days before impersonating the bridal Elsa opposite Lauritz Melchior in "Lohengrin". Best wishes for health and happiness to all.

Singing-Usher

JOSEPH CLIFFORD, usher of the 39th Street aisle of the Metropolitan Opera House, gave a song recital at the Lyric Theatre in Baltimore on April 14th, which preceded by a week his appearance as Don José in Denver.

Philadelphia

DEEMS TAYLOR'S new work, a three-act opera, "Ramuntcho", will have its world premiere in the 1941-42 season of the Philadelphia Opera Company. It is a tragic-romantic opera, based on a novel by Pierre Loti, and has its setting in the Basque country of Spain. It will be one of seven operas in next season's repertory to be given in English. The others are: "Faust", "The Bohemian" ("La Boheme"), "The Bat" ("Die Fledermaus"), "The Rose Cavalier" ("Der Rosenkavalier"), "Tales of Hoffmann", and "They All Do It" ("Cosi Fan Tutte").

The overture and ballet music of Mr. Taylor's work, "Ramuntcho", were played at a concert in Carnegie Hall a year ago. The plot of the opera has to do with the hero, Ramuntcho, and his sweetheart. He must go away for military training and his love promises to wait for him. Her mother, however, intercepts his letters and the girl, thinking he has forgotten her, in desperation takes the veil. Ramuntcho eventually returns, but too late.

Popular Puccini

THE Philadelphia Opera Auditions are over and the talents and potentialities of some 304 singers are now being weighed and considered by the judges. Applicants came from many states and various walks of life. There was a 23-year-old barber from Cedar Rapids, Iowa; a 22-year-old nurse on probation in Baltimore's Mercy Hospital; a 26-year-old designer of evening gowns for a leading New York manufacturer; a 19-year-old telegraph messenger boy from Pensacola, Florida; and a 30-year-old second vice-president of a department store in Youngstown, Ohio.

According to Sylvan Levin, musical and Thomas Martin as assistant conductor. The St. Louis Opera Guild has been busy during the current season and has done much to bring opera performances to the general public. Outstanding for her work in guild activities has been Ruth Kelley Martin, concert violinist and wife of the assistant conductor.

Kerstin Thorborg

KERSTIN THORBORG, Swedish mezzo-soprano, whose glorious voice recalls another Swedish nightingale, Jenny Lind, is probably the only singer to begin a career in a perambulator. One day, as the baby was being wheeled about the streets of Stockholm, singing as usual for the amusement of passersby, Carolina Oestberg, prima donna of the Royal Opera, hearing her, said, "I think that little girl will become a real opera singer some fine day." Miss Thorborg's father owned and edited the local newspaper and sang for recreation. Her mother, too, loved music. The family also included two sons and Kerstin vied with her brothers at games and sports to such an extent that she became an expert skater, skier and a fearless horsewoman. This physical prowess prepared her for the strenuous life of an opera singer, which demands a well-coordinated body and a healthy mind.

Her career began when, as a schoolgirl, she engaged in competition with 1200 applicants for entrance into the opera school of the Stockholm Royal Opera. She was one of the three accepted, and so rapid was her progress, that in a few years she was permitted to make her stage debut as Amneris in "Aida".

Four years later she accepted an engagement at the Prague opera, followed by triumphant entries into Berlin, Buenos Aires, Vienna, Salzburg and London. With 1936 came her first visit to America as a member of the Metropolitan Opera, during which she made a sensational New York debut as Fricka in "Walküre". Now completing her fifth consecutive season here, Madame Thorborg plans to spend the summer in the United States instead of returning to her home in Sweden.

On a recent Metropolitan tour, she was heard in Boston as Venus in "Tannhäuser" on March 28th, as Brangäne in "Tristan und Isolde" on April 2nd, and as Ortrud in "Lohengrin" on April 14th. In Cleveland she sang "Brangäne" on April 15th and Fricka in "Die Walküre" on the 17th. In Atlanta her only role was Ortrud on April 30. After the opera tour, she will close her season with an appearance at the Cincinnati May Music Festival where she will sing in "Bach's B minor Mass" and [illegible]

• CHIRON •

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you before the Bureau in this matter, the ruling in the case is being furnished direct to you. Mr. Petrillo is being advised to this effect.

Under the terms of the contract the hotel engaged the personal services of eight musicians and a girl vocalist under your leadership. The contract specified the place where the engagement is to be performed, the dates of the engagement, and the lump sum weekly payment for the services of the orchestra. It is expressly stated in the contract that the hotel shall have complete control of the services to be rendered thereunder. It also provided that you, as leader, shall distribute the amount received from the hotel to the musicians in accordance with the list appearing on the reverse side of the contract. Such list shows the names of the members of the orchestra, their social security account numbers, and their individual compensation. The contract was signed by a representative of the hotel and by an employee of the Music Corporation of America, a booking agency, as your representative.

Upon the basis of the terms of the contract it is clear that the hotel has the right to exercise over you and the musicians performing under your direction the control and direction prescribed by the applicable regulations as being necessary to establish the relationship of employer and employee. It is, therefore, held that you and the other members of the orchestra are employees of the Stevens Hotel for purposes of the taxes in question.

Respectfully,

(s) GUY T. HELVERING,
Commissioner.

to Collector,
Chicago, Illinois.

BARGAINS Regulation BAND COATS, A. F. of M., Blue or Black, $2.50; Brand New Band Caps, all colors and sizes, $1.50; 40 Black Lapel Coats, $30.00; 35 Maroon Lapel Coats, $100; 30 Boys' Band Coats, Blue, $35.00; 41 Maroon CAPES, $100; Double Breasted, New, Tuxedo Suits, $18.00; Majorette Costumes, $3.00; Used Shakos, $3.00; New Shakos, $5.00; 65 Blue CAPES, $5 CAPS, all $200. FREE LISTS.

AL WALLACE

2416 NORTH HALSTED ST. CHICAGO, ILL.

epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

president of a department store in Youngstown, Ohio.

According to Sylvan Levin, musical and artistic director of the Philadelphia Opera Company, 80 per cent of the applicants had had no previous operatic experience. Although the company is not yet ready to announce the finalists who will be taken on for the 1941-42 season, it is the belief of Levin and his associates on the auditions committee that at least 60 per cent of the singers heard possess voices of "true operatic possibilities". In the case of the remaining 40 per cent, the Philadelphia conductor declares, "There is regrettable evidence of many good voices ruined or on the verge of being ruined by bad training."

Among the amusing side-lights of the auditions as reported by Mr. Levin is the fact that 97 out of the 122 sopranos chose the same aria for their hearings, "Un Bel Di" from "Madame Butterfly" and that 61 out of 86 tenors sang Rodolfo's narrative from "La Boheme", both by Puccini.

New Jersey

THE Newark Civic Opera Company, in conjunction with the New Jersey Opera Association, presented a performance of the "Barber of Seville" on April 25th in Newark, N. J., with a cast headed by Jessica Davis, Claudio Frigerio, Franco Perulli, Nino Ruisi and Pompilio Malatesta.

Chicago

THE San Carlo Opera Company recently closed its engagement in Chicago, during which time it presented ten performances of standard Italian and French operas, and a small number of English productions. The season extended from April 12th to 20th.

St. Louis

THE Spring season of the St. Louis Grand Opera Association opened April 16th with a performance of "Don Giovanni". The leads were sung by Ezio Pinza, Tito Schipa and Nicola Moscona. "Mignon" with Gladys Swarthout, Christina Carroll and Armand Tokatyan was heard on April 21st, followed on the 24th by "La Traviata" with Helen Jepson, James Melton and Carlo Morelli. The double-bill "Cavalleria" and "Pagliacci" was given April 26th. The Mascagni favorite enlisted the services of Dusolina Giannini, Kurt Baum and Alexander Sved as principals, while "Pagliacci" included Giovanni Martinelli, Alexander Sved, George Czaplicki, Vivien della Chiesa and Mr. Cavadore. The orchestra was under the leadership of Laszlo Halasz with close her season with an appearance at the Cincinnati May Music Festival where she will sing in "Bach's B minor Mass" and Elgar's "Dream of Gerontius".

INTERNAL REVENUE DEPT. DECIDES FOR FEDERATION

(*Continued from Page One*)

following communication to the Honorable Commissioner of Internal Revenue:

February 20, 1941.

The Honorable Commissioner of
Internal Revenue,
Bureau of Internal Revenue,
Washington, D. C.

My Dear Mr. Commissioner:

As President of the American Federation of Musicians, and acting at the personal request of the musicians themselves, I am enclosing herewith two contracts entered into by members of the Federation with establishments employing their services as musicians in Chicago, Ill. These are actual existing contracts and I am requesting that the Bureau give consideration to these contracts and make a ruling with respect to the question whether or not under these contracts the establishments for which the musical services are rendered, are as a matter of law, the employers of the members of the Federation whose personal services are therein contracted for.

It is the view of the American Federation of Musicians, and my own and also the view of the members of the Federation who have entered into these contracts that under same there can be no reasonable question but that the musicians, including the leaders of the orchestras, are all employees of the contracting establishments and that these latter establishments are the employers of these musicians.

This ruling is requested in order that the employer's tax liabilities under the Social Security Act may be properly determined.

Very respectfully yours,
JAMES C. PETRILLO, President,
American Federation of Musicians.

On April 11, 1941, the following answer from the Honorable Commissioner was received by one of the two band leaders; it is self-explanatory:

TREASURY DEPARTMENT
WASHINGTON

April 12, 1941.

A&C:RR:3
Mr. Ray Heatherton,
Stevens Hotel,
Michigan Boulevard at Balbo Drive,
Chicago, Illinois.

Sir:

This office has received a request from Mr. James C. Petrillo, President, American Federation of Musicians, for a ruling as to the status, for purposes of the taxes imposed by Sub-chapters A and C of Chapter 9 of the Internal Revenue Code (Federal Insurance Contributions Act and Federal Unemployment Tax Act, respectively), as amended by the Social Security Act Amendments of 1939, of you and the musicians performing under your direction at the Stevens Hotel, Chicago, Illinois, pursuant to a contract dated January 20, 1941. A copy of such contract has been submitted to this office.

Since no power of attorney has been submitted authorizing Mr. Petrillo to represent you in connection with the matter, a copy of this letter is being sent to the Collector, Chicago, Illinois.

Commissioner.

A similar letter was received by Les Brown, leader of the orchestra at Michael Todd's Theatre Cafe in Chicago.

I think now that the question as to who is the real employer—the leader, or the owner of an establishment—had been made quite clear by this ruling and by the adoption of this contract.

In accordance with these conclusions all members of the American Federation of Musicians are herewith instructed that, at the expiration of their present contracts with hotels, cafes, restaurants, etc., this standardized form contract be accepted and put into force, and from then on the contractor or leader will not be held responsible for the payment of the Social Security Tax on such engagements.

For the information of members of the American Federation of Musicians I am inserting here a copy of the contract, exactly as it was accepted and signed in Chicago:

CONTRACT BLANK
AMERICAN FEDERATION OF MUSICIANS
LOCAL 10

THIS CONTRACT for the personal services of musicians, made this 28th day of January, 1941, between the undersigned employer (hereinafter called the employer) and eight musicians, plus leader, plus girl vocalist (Including Leader) (hereinafter called employees), represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of RAY HEATHERTON according to the following terms and conditions:

Place of employment—STEVENS HOTEL.
Date(s) of employment—Begin Saturday, March 1, 1941, to April 11th inclusive.
Price agreed upon—$1,050 weekly, which price includes transportation.
(Terms and amount)
To be paid—Weekly.
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of employer—STEVENS HOTEL.
By
Street Address—Balbo and Michigan.
City or State—Chicago, Illinois.
Phone
Accepted by Employer—P. JONES (s).
Accepted—RAY HEATHERTON,
Orchestra Leader.
By—M. B. CIJNAY,
Representative of Employees.

(Appearing on back of contract is the following):

Names of Employees	*S. S. Number*	*Wages*
Ray Heatherton (Leader)	113-01-4532	$119.22
Conrad Silke	113-07-2240	96.12
Art Lee	092-05-2240	96.12
Art Kerr	072-12-6589	89.52
Carmine Furia	089-05-3186	89.52
Vincent Bishop	035-14-2970	89.52
Larry Molonelli	054-07-8684	96.12
Ed. Griffin	212-14-3609	89.52
Bill Telfer	113-04-9652	89.53
Judy Clark	103-12-7629	50.00
* Transportation, commission, miscellaneous		144.82
	Total	$1,050.00

The above explanation makes it clear that the solution of our social security problem lies in the adoption of a standardized Federation contract which must be used by all musicians on all engagements. The International Executive Board has adopted the contract form which is shown above.

Members are therefore advised that on and after June 1, 1941, all members of the Federation must sign contracts for all engagements, traveling or local, on this contract form and none other.

The licensed booking agencies will also be required to use this contract form. Members must refuse to play any engagement if the engagement is contracted on any other form after May 31, 1941.

Kindly be governed accordingly.

Fraternally yours,
JAMES C. PETRILLO, President,
American Federation of Musicians.

Plaintiffs' Exhibit B-37.
Filed in U. S. District Court December 13, 1944.

International Musician

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— OF THE —
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An able man shows his spirit by gentle words and resolute actions.

—CHESTERFIELD.

Social Security Protection

BY order of the International Executive Board the following notice was sent to all Locals of the American Federation of Musicians on May 1, 1941:

absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract, or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer

Street Address

City or State

Phone

Accepted by Employer

Accepted

(Orchestra Leader)

By

(Representatives of Employees)

FORM B

The reverse side of the contract contains the following:

NAMES OF EMPLOYEES (Leader)	S. S. NUMBER	WAGES

All officers of Locals and all members are required to adhere strictly to this order, as this is the only means by which we can help protect the interests of the members under the Social Security Laws of the United States.

Fire Drill Time Here

to ourselves. At this time fire prevention becomes a national responsibility, because of national defense. Fire is the "saboteur" par excellence. Fire wastes. Fire delays. Fire destroys. It consumes that most precious of elements —time. It gives no quarter. It is the most ruthless of conquerers.

Luckily, fire isn't invincible. It wins its victories because of human laziness, human ignorance, human carelessness, human irresponsibility. It feeds on these common failings. Correct those failings—and fire is licked to a frazzle.

This campaign against fire must be constant. We can't afford to put it off until tomorrow. We can't afford to pass the buck or take it for granted that others will do our part of the job for us. Keep always in mind that every fire we prevent marks a definite contribution to national defense.

Lastly, in this war against fire, don't do too little—and don't do it too late. As the phrase goes, time is of the essence. And time is something we can't buy back. It would be a tremendous achievement if, at the end of 1941, we could look back and say, "This was the year in which fire met its master".

Atmosphere

(*From the* PAINTER AND DECORATOR)

FEW drivers of automobiles realize that the chief enemy of speed in their cars is the unseen and silent atmosphere. Physicists have proved that, after a car has reached a speed of forty miles an hour, more power is needed to overcome air-resistance than road-resistance. If a car is going fifty miles an hour, between fifteen and twenty-three horsepower is used simply to overcome air-resistance, and that is more than one-fourth the horsepower of the ordinary engine.

In many ways automobiles remind us of men, especially in this particular. When far-seeing men try to bring about some reform, their work in advancing the reform is more than half spent in overcoming the pervasive, silent, obstinate opposition of prejudice and selfishness. The atmosphere of society must be overcome before any progress can be made with the reform. When this persistent and universal force works at last with the improvement, the reform is virtually accomplished.

To All Locals of the
American Federation of Musicians:

Enclosed herewith you will find a sample copy of the new contract form adopted by the International Executive Board to cover all engagements excepting those played in theatres and radio stations and with grand opera companies and symphony orchestras.

This contract is the one which has been adopted by the International Executive Board for the purpose of protecting our members under the Social Security Laws and upon which favorable decisions have been received by our members from the Internal Revenue Department.

This contract and none other must be used on all such engagements on and after JUNE 1, 1941. Any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for said violation. All engagements booked by licensed agencies must be contracted on these forms.

A supply of these contracts may be secured from the International Secretary's office.

Kindly be governed accordingly.

Fraternally yours,

JAMES C. PETRILLO,
President, A. F. of M.

Attest:
FRED W. BIRNBACH,
Secretary, A. F. of M.

The contract mentioned therein is Form B, which reads as follows:

CONTRACT BLANK
AMERICAN FEDERATION OF MUSICIANS

Local Number

THIS CONTRACT for the personal services of musicians, made this day of , 194 , between the undersigned employer (hereinafter called the employer) and musicians (hereinafter called employees) (including Leader) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of according to the following terms and conditions:

Place of employment
Date(s) of employment
Hours of employment
Price agreed upon $
(Terms and amount)

To be paid
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness,

Anti-Poll Tax Bill

THE payment of a poll tax as a condition precedent to voting is required in eight States out of forty-eight in the Union.

The tax ranges from $1.00 a year non-cumulative to $2.00 a year cumulative. In States where poll tax payment is a requirement, the percentage of voters who cast their ballots in the 1940 election was 21.1%. In the forty non-poll-tax States, the percentage was 70.59%. It is obvious that the poll tax is a disfranchisement to practically 50% of the voters in the eight States.

Congressman Lee E. Geyer of the 17th District of California has introduced the Geyer-Pepper Anti-Poll Tax Bill. It has been endorsed not only by the American Federation of Labor, but also by the Railroad Brotherhoods and the Congress of Industrial Organizations. The bill is bottled up in the House Judiciary Committee. The signatures of 218 Congressmen are required to bring the bill to a vote in the House.

We suggest that you write your Congressmen, requesting them to sign discharge petition No. 1 in order to release from disfranchisement 50% of the voters in the eight States above mentioned.

The 1941 Convention

WITHIN two weeks from our publication date will commence the annual trek to the Convention in Seattle. In these times of strife and stress each Convention becomes more important than the last.

Our Conventions have always been constructive, and there is no doubt in the mind of your Editor that the 46th Annual Convention will prove no exception to the rule. Our Conventions are the congress of the professional musicians. Democratic procedure at its best is exemplified by our deliberations. Delegates attending for their first time are always impressed by this fact.

We are again calling to the delegates' attention the fact that evenings in Seattle in June are cool. Topcoats are more often than not required and delegates should arrange their wardrobes accordingly.

Saboteur Par Excellence

AT the end of May the National Board of Fire Underwriters will celebrate its 75th anniversary. And that celebration should be shared by the whole country—no organization has done as much to fight fire on all fronts, and to encourage communities, industries and individuals to protect their properties against an enemy which is menacingly "on the job" 24 hours a day, 365 days a year.

Furthermore, the end of the National Board's first three-quarters of a century of achievement in the public interest should serve to encourage the entire country to join in a continuous, unremitting fight against fire that will get results far superior to any attained in the past.

At any time, fire prevention is a duty and an obligation we owe to our neighbors and our community, no less than

Dr. Charles Stelzle

IT is with deep sorrow that we announce the death, on February 27th, at the age of 72, of Dr. Charles Stelzle, long a contributor to these columns. A Presbyterian minister, Dr. Stelzle had for forty years been closely affiliated with the American Federation of Labor. He was superintendent of the department of church and labor of the Presbyterian Church, delegate to the annual labor conventions, field secretary of the Federal Council of the Churches of Christ in America, public relations counselor and a writer for more than 300 monthly and weekly labor journals. He will be remembered especially for his keen insight into national problems, for his fearless denunciation of evils, political and social, and for his championship of the causes of labor and democracy. The following article, received at this office the day after his death, reveals better than anything we can say the calibre of the man.—THE EDITOR.

If a Man Die

By DR. CHARLES STELZLE

If a man die shall he live again? No—because he shall never die. There's something in man that lives forever.

You are the same man that you were twenty years ago, but your body has been replaced several times during this period. Your brain is rebuilt twice each year.

But Memory remained with you clear through this transformation.

Nothing is ever destroyed. Coal burns, but the ashes and smoke and gases precisely equal the original bulk. They have simply taken on another form.

Arguing from the indestructibility of matter, can you believe that memory and heart treasure and soul culture perish?

When a tree has borne leaves and fruit, its work is done. But not even the wisest man who ever lived had finished his work when "death" came. He was just beginning to understand.

Can this be all of life for him? Is there nothing left but a hole in the ground? Does this seem in harmony with God's method, which in everything else brings us on from glory to glory?

Many of man's faculties are like unwrapped tools in a chest, unexamined, unnamed, waiting for use in a future world.

We know that perfection cannot be realized in the present world. There must be something ahead—the immortality which will permit us to see the fulfillment of our dreams.

And this new world would be incomplete without those who struggled to bring men nearer to perfection in the present world.

[fol. 799] Q. Now, Mr. Hild, do you find on the same page 24 from which you last read a reference to the gathering of the 1941 Convention of the American Federation of Musicians?. A. Yes, I do.

Q. The statement is made there that two weeks following the date of the publication of that 1941 issue, the convention was due to convene; is that right?

A. That is correct.

Q. Now then did you find any reference to any By-Laws or By-Law changes in any of those pages of the May 1941 issue recording what had happened in connection with Form B contract?

[fol. 800] A. No.

Mr. Padway: I was just thinking that question over. Did you find any? I think that calls for a legal conclusion, and I ask the court to permit the objection to the question and the answer for this reason, what was done is there.

Mr. Clarkson: The question and answer may go out so far as that is concerned. It may go out.

Q. From time to time some, at least, of Petrillo's orders were published in the Official Journal of the Musicians Union, were they not?

A. Yes, as was this one.

Q. You can see that? A. Yes.

Q. You know that the By-Laws require the secretary to certify and publish the official proceedings of the Executive Board, don't you?

A. Certify and publish?

Q. Yes.

A. No, no. That is not true.

Q. Some of them are kept secret too?

A. Frequently are not published.

Q. As a high officer of the Union where would you go to find out whether or not your President had issued bind-

[fol. 801] ing orders?

A. As an officer of the Federation I don't think I would have to go because I believe that I would be advised of those by telegram or letter.

Q. Where would a poor member have to go?

A. He would go either to his Local secretary or to the National office.

Q. Now then do you claim that the Local secretaries were given notice in writing advising them of any change in By-Laws at any time during 1941?

A. Yes, I think they were. It would be unusual if they were not given any notice of any changes in By-Laws.

Q. That notice which you think was given would be in writing, would it not?

A. Probably so.

Q. Do you have such notice? A. No.

Q. Does the counsel for intervener have such notice?

Mr. Padway: We contend the letter is the notice.

Mr. Charlton: That letter?

Mr. Padway: We contend that letter notified them of the adoption of the Form B and Form B changes.

Mr. Charlton: You claim no further notice to the members of the Union than that notice which has been read [fol. 802] in evidence.

Mr. Padway: And the magazine changes of the official document which you have also offered in evidence.

Mr. Charlton: Now I am claiming no further notice than that was given at any time during 1941 to booking agencies. You claim no further notice to booking agencies, do you?

Mr. Padway: There is no further notice than this, the International Musician which goes to booking agencies, that magazine, the letter which was directly addressed to the booking agencies, and the letter which was addressed to Locals, which was slightly different in texture. They also got notice of that.

Mr. Charlton: That is the notice which you rely upon as sent to the booking agencies?

Mr. Padway: With the change, or the adoption of the means or the method of contracting and the terms and conditions of the contract that governs members.

Mr. Charlton: Do you claim any other notice was sent to booking agencies?

Mr. Padway: I don't know of any other notice given. I will agree with you that none other was given.

Mr. Charlton: That concession is accepted.

Q. Now then at the close of the 1941 convention a revised official copy of the Constitution, By-Laws and Stand-[fol. 803] ing Rules of the Musicians Union was prepared and published, was it not? A. It was.

Q. That preparation and publication was under the direction and supervision of the secretary?

A. It was.

Q. That preparation occurred subsequent to the date of the Petrillo letter which you have read in evidence and subsequent to the '41 convention? A. Yes.

Q. You know that various revisions of the By-Laws were made in that 1941 edition, don't you?

A. I do.

Q. For example, you know that Section 11 or Article IV of the By-Laws was deleted in the 1941 edition as compared to the 1940 edition, do you not?

A. I don't recall the section. If you can give me the subject matter I can probably answer.

Mr. Charlton: I will withdraw that last question for the present.

Mr. Padway: We will agree that there were various revisions every year. We know that. We are not conceding that action taken by the convention revising it is put in the book.

[fol. 804] Q. Now then turning to Section 29 or Article X of the 1941 official copy of the By-Laws, do you find something in there relating to employment of members of the Union by establishments? A. I do.

Q. Or rather prohibition of employment of members of the Union by establishments? A. I do.

Q. That is the same old friend that Mr. Padway mentioned that had been in the By-Laws for fifteen or twenty years? A. Yes.

Q. In 1942 your secretary further revised and brought up to date your By-Laws and there was an official publication of them given, was there not? A. There was.

Q. And that action was following the 1942 convention?

A. Yes.

Q. That is the regular practice to wait until after the annual convention to revise? A. Yes.

Q. And re-edit and re-publish the By-Laws?

A. That is correct.

Q. In the 1942 Official Publication of the By-Laws do you find that Section 29 of Article X is the same old, [fol. 805] fifteen year old, or sixteen year old friend?

A. Yes, it is here.

Q. No different from the one of 1941?

A. That is right.

Mr. Padway: Would it be all right to offer the book now in connection with the witness' testimony, Intervener's Exhibit No. 6, Constitution and By-Laws?

Mr. Charlton: All right.

[fol. 806] Interveners' Exhibit 6.

Filed in U. S. District Court December 13, 1944.

Constitution

By-Laws and

Standing Resolutions

of the

American Federation of Musicians

of the

United States and Canada

As Amended and Adopted at the Forty-seventh Annual Convention, Held at Dallas, Texas, June 8-13 1942

* * * * * * *

By-Laws

Article I—Duties of Officers and Organizers.

Section 1. Duties of President. It shall be the duty of the President to preside at all meetings of the Federation and Executive Board; sign all documents of an official character pertaining to the Federation; sign all vouchers; appoint all committees unless otherwise ordered. It shall be his duty and prerogative to exercise supervision over

the affairs of the Federation; to make decisions in cases where, in his opinion, an emergency exists; and to give effect to such decisions he is authorized and empowered to promulgate and issue executive orders, which shall be conclusive and binding upon all members and/or Locals; any such order may be its terms (a) enforce the Constitution, By-Laws, Standing Resolutions, or other laws, resolutions or rules of the Federation, or (b) may annul and set aside same or any portion thereof, except such which treat with the finances of the organization and substitute therefor other and different provisions of his own making; the power so to do is hereby made absolute in the President when, in his opinion, such orders are necessary to conserve and safeguard the interests of the Federation, the Locals and/or members; and the said power shall in like manner extend to and include cases where existing laws are inadequate or provide no method of dealing with a situation. He shall call special sessions of the Executive Board when necessary; call strikes; draw upon the funds of the Federation to pay the salaries of traveling members accompanying a theatrical organization when called on to strike while on the road, and for the payment, if necessary, of hotel and traveling expenses of other members who are called on strike by him during any emergency when outside of their own jurisdiction and play engagement for which no tax is collected by the Federation, and for which otherwise no strike benefits are paid; draw funds in payment of all expenses occasioned by the exercise of his duties; perform such other duties as may elsewhere be provided for in the Constitution, By-Laws and Standing Resolutions of the Federation; have the casting vote of a tie, and at the end of his term of office he shall report his acts and doings to the Annual Convention of the Federation, and upon convening of the Convention he shall appoint the following committees, viz.: First, Credentials; second, Finance; third, Laws and Supervisions; fourth, Measures for the benefit of the Federation, and such other committees as may be voted for by the Convention.

* * * * * * *

Sec. 3. Duties of the Secretary. The Secretary shall keep a faithful record of the proceedings of all meetings; answer all communications appertaining to the Fed-

eration; issue all charters upon receipt of a certified list of applicants for membership; inform all locals of all additions to the Federation, as well as all properly presented claims for default of services rendered by members; notify the delegates of all meetings; issue monthly statements of erased, suspended, expelled and transferred members in tabulated form; attest all bills and orders; cause the minutes of each convention to be printed in full and distributed to the Locals not later than thirty days after adjournment; publish not later than the July issue of the International Musician, all laws that have been amended, added to, or in any way changed; he shall send to each Local Secretary every six months a copy of the galley list of the Local for inspection; he shall in his annual report, under the heading of "List of Locals," designate the jurisdictions of every Local as recognized by the A. F. of M.; he shall add to the list of Locals the name of each Local as it is known in its jurisdiction; procure and preserve the necessary books, papers and other documents appertaining to his office, and transmit them to his successor when properly qualified to receive the same, clear of all incumbrance. And for the faithful performance of his duties he shall receive a salary of fifteen thousand dollars ($15,000.00) per annum, payable semi-monthly; he shall be authorized to employ stenographers, typists and such other clerical assistance as may be necessary, at his own discretion; he shall notify all Presidents of Locals to incorporate an order of business through which members will be instructed to patronize none but union men and purchase only such goods as bear the union label.

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Article IX—Rights and Duties of Locals

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Sec. 24. Locals have a right to insist that Local leaders or contractors engage local members to fill miscellaneous engagements outside of the local jurisdiction.

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Sec. 27. A Local has the right to prevent a member from colonizing musicians in its jurisdiction. A leader, manager or agent (member of the Local) must obtain the consent of his Local before engaging musicians from out-

side for permanent or single engagements. But a member so imported shall not be required to deposit a transfer card unless the engagement extends over four weeks. Such member must not fulfill any other engagement until his transfer card has been deposited unless permission is granted by the Local.

* * * * * * *

Article X—Rights and Duties of Members.

* * * * * * *

Sec. 13. Leaders, contracting members or other members of a Local who demand, request, induce or try to induce other members not to play with or for any leader or contracting member, or with or for any other member or members, shall be fined not less than $25.00 nor more than $100.00, or be suspended or expelled from membership by the Local with which they are affiliated.

* * * * * * *

Sec. 20. Members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M. (See Article XVI—Contract Forms.)

Penalty: Fine of not less than $100.00.

* * * * * * *

Sec. 23. A contracting member who assumes the responsibility for the payment of a member's services is bound by his action, and cannot escape his obligation by claiming the protection of any Local or A. F. of M. law.

Sec. 24. A. Leaders of orchestras or bands playing season engagements on boats plying between different ports may engage members from any Local. Where Locals are maintained in such ports the highest price in existence among them governing such work shall prevail. However, if the International Executive Board deems the price maintained by any one Local contrary to the interests of any other Local equally interested, then the International Executive Board shall assume jurisdiction over the engagement and name a price equally binding upon all Locals and members.

* * * * * * *

Sec. 29. Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished, provided that in states or provinces where laws exist, which prescribe a different method of contracting, or where the provisions of law are such that to contract as above prescribed would be contrary to the interests of members, Locals are authorized to establish such method of contracting as may best conserve the interest to members. However, members may accept engagements from traveling theatre company managements direct, provided their contract, in addition to the signatures of the contracting parties, is countersigned by the musical director of the company or the member of the Federation who engages the members for the company. Furthermore, members may contract with symphony orchestra management direct in conformity with all Local and Federation laws.

If a member violates the above, such action shall constitute his resignation from membership in such Locals where he held membership, and in the American Federation of Musicians.

Sec. 30. A member of the Federation cannot accept an engagement to join a traveling band or orchestra from a non-member, neither can he negotiate with a non-member for such an engagement.

A member shall be deemed guilty under the provisions of this law if he negotiates for such an engagement as named in the law with a non-member, even though he subsequently signs a contract for the same engagement with a member of the Federation.

A fine of $100.00 shall be imposed upon a member who violates this law, and if failing to obey the instructions of a Local or an officer of the Federation to forthwith surrender such engagement it shall be considered equivalent to his resignation from all Locals wherein he held membership, and in the American Federation of Musicians, and

all Locals and members of the Federation must therefore consider him a non-member.

* * * * * * *

Sec. 45. Any member, leader or contractor employing members of the A. F. of M. on any traveling, location or out-of-town engagement shall employ only such members who are in good standing in their respective Locals and carry their Local Union Cards paid up to date. For any violations of this section he shall be subject to a fine of not less than $10.00, nor more than $50.00 for each and every violation.

* * * * * * *

Sec. 48. Members of the American Federation of Musicians who accept engagements for bands or orchestras must in person sign their contracts for same or give some agent power of attorney to sign their names. They are responsible for the fulfilling of the contract under union conditions, and ignorance of the terms of any contract signed by an agent shall not be valid excuse. The contract must be submitted to the Local Union for inspection in accordance with the rules of the Federation. All collections for the engagement must be made by the member who furnishes the orchestra and not by the agent. Members of the orchestra must be paid by the contracting member or leader of the band or orchestra and not by the agent. All agents who go into collusion with members to defeat the object of this or any other law of the American Federation of Musicians shall be held as unfair to it by the Federation, and thereafter members cannot accept engagements from or through them.

The price of an engagement must cover the services rendered by musicians, and nothing else. If an orchestra carries added attractions, such as singers, etc., the contract must show an additional charge to cover their services. Leaders, their agents or contracting members, are prohibited from furnishing singers free of charge on any and all engagements.

If members fail to contract for engagements as herein prescribed or in any way violate the provisions of this law, such action shall constitute their resignation from member-

ship in such Locals wherein they held membership, and in the American Federation of Musicians, and they shall be held as unfair to the Federation.

Article XII—Transfer Members.

Sec. 18.

Traveling members other than leaders must sign contracts with contractors, members of the A. F. of M.

Article XIII.

Traveling Orchestras And Members.

Traveling Cards And Tax.

Members Playing Out-Of-Town Engagements.

Sec. 10

C. A contractor or leader, as the case may be, in every case before an engagement is played, must submit his contract for same to the Local Union in whose jurisdiction same is played, or in the absence of a written contract file a written statement with such Local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hours of the engagement, as well as the names of the members who will play same and the Locals to which they belong who will play same and the Locals to which they belong, their Social Security numbers and the actual amount of money paid each individual sideman, which cannot be less than the minimum Local scale plus the Federation surcharge.

In addition to furnishing the foregoing information, a contractor or leader, as the case may be, must, before the engagement is played, inform the Local in whose jurisdiction the engagement is played the amount collected as to transportation charges and a point from which the transportation charges are made, and the exact and correct

amount of percentage which will be paid to an agent or agents as compensation for booking the engagement.

* * * * * * *

I. In the selecting of the members of the orchestra, the leader or manager of same need not confine himself to the membership of the Local in whose jurisdiction the orchestra is organized.

* * * * * * *

K. All contracts between leaders and members of traveling dance orchestras wherein a specified number of weeks is not named can be cancelled by either party giving two weeks' notice to the other.

L. * * * * *

A member cannot form a traveling dance orchestra in the jurisdiction of the Local to which he belongs, and make such jurisdiction the headquarters of the orchestra, and compete for and fill local engagements with same.

M. * * * * *

Note—In all else the Constitution, By-Laws and Standing Resolutions of the A. F. of M. shall apply to the members of a traveling orchestra.

* * * * * *

Article XVI—Official Forms.

Official Contract Blank for All Engagements.

Contract Blank

American Federation of Musicians

Local Number .....

This Contract for the personal services of musicians, made this ..... day of ....., 194...., between the undersigned employer (hereinafter called the employer) and ..... musicians (including Leader) (hereinafter called employees) represented by the undersigned representative.

Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the

employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of ....., according to the following terms and conditions:

Place of Employment .....
Date(s) of Employment .....
Hours of Employment .....
.....
.....
.....
Price Agreed Upon: $.....
(Terms and Amount)
To be paid .....
(Specify When Payments Are To Be Made)
.....

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and

nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer ..... Accepted by Employer .....
Street Address ..... Accepted .....
City or State ..... (Orchestra Leader)
Phone ..... By .....
(Representatives of Employees)

Article XVII- Miscellaneous.

Section 1. Performers on musical instruments of any kind who render musical services for pay are classed as professional musicians and are eligible for membership, subject to the laws of and jurisdiction of the A. F. of M.

Article XIX.

Standing Resolutions

Number 58.

To promote his business, a leader may borrow money in any manner not contraventive of Standing Resolution No. 58 or any other law, rule or resolution of the Federation, but he must not make any arrangement and/or agreement directly or indirectly subjecting him to interest and/or bonus of more than 10% per annum nor more than a total of 25% of the total sum borrowed and which is to be repaid.

Leaders of bands or orchestras are prohibited from employing, either directly or indirectly, or through any device or method whatsoever, personal representatives who are not licensed by the Federation.

Leaders of bands or orchestras are prohibited from directly or indirectly, through any device or method whatever, acquiring any financial interest of whole or part ownership in any other band or orchestra, provided that a leader may wholly, but not in part, own any other band which accepts or fills engagements under his own name.

* * * * * *

[fol. 807] Q. Now in the 1942 revised edition, do you find an Article IV of the By-Laws as revised and published there, a number of paragraphs which do not appear in the 1941 edition of the By-Laws?

A. No. I don't see any difference.

Q. Article IV?

A. Article IV, page 44. They seem to run the same.

Mr. Chanlton: I will withdraw the question.

Q. You find in Article IV of the Constitution as published in 1942, a number of paragraphs which do not appear in the 1941 edition?

A. Yes, I see them here now.

Q. And there were revisions made in that Article IV of the Constitution prior to the publication of the 1942 official copy of the By-Laws and Constitution?

A. Yes, sir.

[fol. 808] Q. Now then I think you testified on direct examination that certain revisions, further revisions appeared in the 1944 copy, official copy of the By-Laws, Constitution and Regulations of the Union?

A. Yes.

Q. Now do you claim that the '44 job was partial and incomplete in any way?

A. I think all of them were incomplete, sure.

Q. Now then you mean by that, that no person can determine from an examination of the Official Published By-Laws what are the existing By-Laws of the Union from time to time?

A. Well, I think as a general matter, yes. As to the specific section I think one would frequently find omissions. Our people some times refer to those as the horror book, you know.

Mr. Charlton: I would not disagree with that.

Mr. Padway: And for a different reason?

Mr. Charlton: That is correct.

Q. Do you know of any secret or public action prior to 1944 which are reflected in the 1944 copy of the By-Laws—do you?

A. There might have been some with reference to transcriptions and recordings.

[fol. 809] Q. Do you know of any others, other than that?

A. Prior to 1944? Yes.

Q. I am asking you to tell the court of any omission in the By-Laws as published in 1944 which you know about at this time?

A. None excepting those regarding transcriptions.

Q. So far as you know the orders which have had to do with By-Laws, except recording By-Laws, are reflected in the 1944 edition; is that correct or not?

A. That is correct.

Q. In the course of your discussions there at Miami did anyone ever raise the objection to this whole plan as to the Form B contract and related matters, that the courts might refuse to enforce a contract which caused the party to agree to abide by the whimsical, capricious, or wise secret decisions of Petrillo in the future conduct of their business?

Mr. Padway: Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination, and not embraced with any issue in this case.

Mr. Charlton: He said they had a full discussion and I would like to know if that question was raised.

The Court: All right. Answer. (Intervenor excepts.)

[fol. 810] A. No such question was ever raised.

Q. Did anyone indicate that it would take a pretty shrewd lawyer to ever find out that a By-Law had been changed prior to the publication of the fact that it had been changed?

A. There had been no By-Laws changed prior to any publication at this time.

Q. You know of no notices other than those which appear and which you have identified and testified concerning, given to your membership or to the booking agencies of any By-Law change other than those which you have mentioned here in your testimony, do you?

A. No. Including, of course, the fact that I deem Form B contract a change in By-Law. I was trying to get at that.

Q. That Form B contract does not refer to any change in By-Laws, does it?

A. No, but the Form B contract specifies control of activities of musicians and advises methods of contracting.

Mr. Charlton: Read the question.

(Question read by the reporter.)

A. The answer was that it specifies a change in the control of the methods and means of the activities of the members.

[fol. 811] Q. Now, Mr. Hild, don't you know that the revised Section 29 of Article X as set out in the 1944 edition of your Official Journal of 1944 edition of your By-Laws was not even intended to become effective until September 15, 1944; don't you know that?

A. No, I don't know that.

Q. If your secretary of your Federation of Musicians in the performance of his official duty said there was, you would still make that claim?

A. If he said there was I would be inclined to question his statement.

Q. He has said there was. You know there is a By-Law which requires the secretary to publish every change of any kind of the By-Laws not later than July following the mak-

ing of the change, in the International Musician, do you not?

A. A change as made at convention or made during the year?

Q. Any change?

A. No, I am not familiar with any such a law.

Q. I hand you what the reporter has marked plaintiffs' Exhibit B-38, and ask you to turn to page 12 of that Official Publication in the right-hand column a little below the center of the page: Do you find printed there the words "New Laws And Changes"?

[fol. 812] A. That is correct.

Q. I think you said you probably used the word laws as meaning by-laws?

A. That is right.

Q. Immediately under that heading do you find a heavy print, black faced paragraph?

A. I do.

Q. Will you read that paragraph for the record?

A. "The following are important new laws and changes in the By-Laws of the American Federation of Musicians, adopted and ratified by the 1944 Convention. They will become effective September 15, 1944, and all members are directed to govern themselves accordingly."

Q. At the bottom of the page in the column, the heading of which you have read appears the word "Continued on page Fourteen", or the words, is that correct?

A. That is correct.

Q. Now turning to page 14, do you find at the middle of the page "New Laws and Changes, (Continued from page 12)"?

A. Yes.

Q. And in the following column, following that heading, do you find on that page 14 a sub-heading entitled, "A New Law Designating Through Whom Members May Accept Engagements"?

[fol. 813] A. Yes, I do.

Q. And what appears under that heading on that sheet of your Official record?

A. "Members of the American Federation of Musicians are permitted to solicit, negotiate or accept engagement to

play in bands or orchestras Only from employers who engage or employ them through a leader, another member, or other persons, who for this purpose shall be considered the agent or agents of such employer. Provided that members may contract personally with a symphony orchestra management."

Q. That is the same material you observed in the 1944 revised copy of the By-Laws, is it not?

A. I would say in fact.

Q. Is your secretary considered efficient?

A. Yes.

Q. When your efficient secretary prepared the 1941 revision of your By-Laws he inserted the Form B contract verbatim, didn't he, as a part of the revised By-Law?

A. Yes.

Q. Your convention took action for the purpose of making that insertion, did they not?

A. They did.

Q. That single action providing for the insertion of that [fol. 814] By-Law was the only action pertaining to Form B contract taken by the 1941 Convention, wasn't it?

A. Repeat that question. The single action regarding Form B contract?

(Question read by the reporter.)

A. What By-Law?

Q. Article XVI of your By-Laws?

A. I am not sure of that, no. I don't know.

Q. You don't know of any other action, do you?

A. No, nor do I know that they were so taken in 1940.

Q. When was the Form B contract devised?

A. 1941.

Q. It is set out verbatim in the 1941 By-Laws?

A. It is.

Q. When was the action revising your By-Laws to insert it taken then?

A. I think it was taken some time after 1941, or at least was not referred to in the 1941 Convention.

Q. Referring to Article XVI of your By-Laws, Mr. Hild, the one which sets out verbatim a copy of that Form B contract—

A. The copy Form B contract was certainly adopted in 1941.

Q. And it was placed in your Revised 1941 By-Laws?

A. Yes.

[fol. 815] Q. As your forward edition of 1941 By-Laws was published? A. Yes.

The Court: I guess we will quit at this point and take a recess until two o'clock.

12:00 noon, court adjourned until 2:00 p. m. today.

Afternoon Session, December 13, 1944,

2:00 O'Clock.

Oscar F. Hild, being recalled, and on further cross-examination by Mr. Clyde B. Charlton, testified as follows:

Q. Mr. Hild, plaintiffs' B-39, which I now hand you is a copy of the Official Printed Constitution, By-Laws and Standing Resolutions of the American Federation of Musicians of the United States and Canada for the year 1940, is that correct?

A. That is correct.

Mr. Charlton: The plaintiffs now offer in evidence plaintiffs' Exhibit B-39.

Mr. Padway: No objection.

Mr. Cohen: No objection.

The Court: It will be admitted.

[fol. 816] Plaintiffs' Exhibit B-39.

Filed in U. S. District Court, December 13, 1944.

Constitution,

By-Laws and Standing Resolutions

of the

American Federation of Musicians

of the

United States and Canada

Held at Indianapolis, Ind., June 10-15. As Amended and Adopted at the Forty-fifth Annual Convention,

1940

* * * * * *

By-Laws.

Article I.—Duties of Officers and Organizers.

Section 1. Duties of President. It shall be the duty of the President to preside at all meetings of the Federation and Executive Board; sign all documents of an official character pertaining to the Federation; sign all vouchers; appoint all committees unless otherwise ordered. It shall be his duty and prerogative to exercise supervision over the affairs of the Federation; to make decisions in cases where, in his opinion, an emergency exists; and to give effect to such decisions he is authorized and empowered to promulgate and issue executive orders, which shall be conclusive and binding upon all members and/or Locals; any such order may by its terms (a) enforce the Constitution, By-Laws, Standing Resolutions, or other laws, resolutions or rules of the Federation, or (b) may annul and set aside same or any portion thereof, except such which treat with the finances of the organization and substitute therefor other and different provisions of his own making; the power so to do is hereby made absolute in the President when, in his opinion, such orders are necessary to conserve and safeguard the interests of the Federation, the Locals and/or members; and the said power shall in like manner extend to and include cases where existing laws are inadequate or provide no method of dealing with a situation. He shall call special sessions of the Executive Board when necessary; call strikes; draw upon the funds of the Federation to pay the salaries of traveling members accompanying a theatrical organization when called on to strike while on the road, and for the payment, if necessary, of hotel and traveling expenses of other members who are called on strike by him during any emergency when outside of their own jurisdiction and play engagement for which no tax is collected by the Federation, and for which otherwise no strike benefits are paid; draw funds in payment of all expenses occasioned by the exercise of his duties; perform such other duties as may elsewhere be provided for in the Constitution, By-Laws and Standing Resolutions of the Federation; have the casting vote of a tie, and at the end of his term of office he shall report his acts and doings to the Annual Convention of the Federation, and upon convening of the Convention he shall appoint the

following committees, viz.: First, Credentials; second, Finance; third, Laws and Supervisions; fourth, Measures for the benefit of the Federation, and such other committees as may be voted for by the Convention.

* * * * * *

Sec. 3. Duties of the Secretary. The Secretary shall keep a faithful record of the proceedings of all meetings; answer all communications appertaining to the Federation; issue all charters upon receipt of a certified list of applicants for membership; inform all locals of all additions to the Federation, as well as all properly presented claims for default of services rendered by members; notify the delegates of all meetings; issue monthly statements of erased, suspended, expelled and transferred members in tabulatd form; attest all bills and orders; cause the minutes of each convention to be printed in full and distributed to the Locals not later than thirty days after adjournment; publish not later than the July issue of the International Musician, all laws that have been amended, added to, or in any way changed; he shall send to each Local Secretary every six months a copy of the galley list of the Local for inspection; he shall in his annual report, under the heading of "List of Locals," designate the jurisdiction of every Local as recognized by the A. F. of M.; he shall add to the list of Locals the name of each Local as it is known in its jurisdiction; procure and preserve the necessary books, papers and other documents appertaining to his office, and transmit them to his successor when properly qualified to receive the same, clear of all incumbrance. And for the faithful performance of his duties he shall receive a salary of ten thousand dollars ($10,000.00) per annum, payable semi-monthly; he shall be authorized to employ stenographers, typists and such other clerical assistance as may be necessary, at his own discretion; he shall notify all Presidents of Locals to incorporate an order of business through which members will be instructed to patronize none but union men and purchase only such goods as bear the union label.

* * * * * *

Article IX—Rights and Duties of Locals.

* * * * * * *

Sec. 24. Locals have a right to insist that Local leaders or contractors engage local members to fill miscellaneous engagements outside of the local jurisdiction.

* * * * * *

Sec. 27. A Local has the right to prevent a member from colonizing musicians in its jurisdiction. A leader, manager or agent (member of the Local) must obtain the consent of his Local before engaging musicians from outside for permanent or single engagements. But a member so imported shall not be required to deposit a transfer card unless the engagement extends over four weeks. Such member must not fulfill any other engagement until his transfer card has been deposited unless permission is granted by the Local.

* * * * * *

Article X—Rights and Duties of Members.

* * * * * * *

Sec. 13. Leaders, contracting members or other members of a Local who demand, request, induce or try to induce other members not to play with or for any leader or contracting member, or with or for any other member or members, shall be fined not less than $25.00 nor more than $100.00, or be suspended or expelled from membership by the Local with which they are affiliated.

* * * * * *

Sec. 20. Traveling members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M.

Penalty: Fine of not less than $100.00.

* * * * * *

Sec. 23. A contracting member who assumes the responsibility for the payment of a member's services is bound by his action, and cannot escape his obligation by claiming the protection of any Local or A. F. of M. law.

Sec. 24. A Leaders of orchestras or bands playing season engagements on boats plying between different ports may engage members from any Local. Where Locals are maintained in such ports the highest price in existence among them governing such work shall prevail. However, if the International Executive Board deems the price maintained by any one Local contrary to the interests of any other Local equally interested, then the International Executive Board shall assume jurisdiction over the engagement and name a price equally binding upon all Locals and members.

Sec. 29. Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished, provided that in states or provinces where laws exist, which prescribe a different method of contracting, or where the provisions of law are such that to contract as above prescribed would be contrary to the interests of members, Locals are authorized to establish such method of contracting as may best conserve the interest to members. However, members may accept engagements from traveling theatre company managements direct, provided their contract, in addition to the signatures of the contracting parties, is countersigned by the musical director of the company or the member of the Federation who engages the members for the company. Furthermore, members may contract with symphony orchestra management direct in conformity with all Local and Federation laws.

If a member violates the above, such action shall constitute his resignation from membership in such Locals where he held membership, and in the American Federation of Musicians.

Sec. 39. A member of the Federation cannot accept an engagement to join a traveling band or orchestra from a non-member, neither can he negotiate with a non-member for such an engagement.

A member shall be deemed guilty under the provisions of this law if he negotiates for such an engagement as named in the law with a non-member, even though he subsequently signs a contract for the same engagement with a member of the Federation.

A fine of $100.00 shall be imposed upon a member who violates this law, and if failing to obey the instructions of a Local or an officer of the Federation to forthwith surrender such engagement it shall be considered equivalent to his resignation from all Locals wherein he hold membership, and in the American Federation of Musicians, and all Locals and members of the Federation must therefore consider him a non-member.

* * * * * * *

Sec. 45. Any member, leader or contractor employing members of the A. F. of M. on any traveling, location or out-of-town engagement shall employ only such members who are in good standing in their respective Locals and carry their Local Union Cards paid up to date. For any violations of this section he shall be subject to a fine of not less than $10.00, nor more than $50.00 for each and every violation.

* * * * * * *

Sec. 48. Members of the American Federation of Musicians who accept engaggements for bands or orchestras must in person sign their contracts for same or give some agent power of attorney to sign their names. They are responsible for the fulfilling of the contracts under union conditions, and ignorance of the terms of any contract signed by an agent shall not be valid excuse. The contract must be submitted to the Local Union for inspection in accordance with the rules of the Federation. All collections for the engagement must be made by the member who furnishes the orchestra and not by the agent. Members of the orchestra must be paid by the contracting member or leader of the band or orchestra and not by the agent. All agents who go into collusion with members to defeat the object of this or any other law of the American Federation of Musicians shall be held as unfair to it by the Federation and thereafter members cannot accept engagements from or through them.

The price of an engagement must cover the services rendered by musicians, and nothing else. If an orchestra carries added attractions, such as singers, etc., the contract must show an additional charge to cover their services. Leaders, their agents or contracting members, are prohibited from furnishing singers free of charge on any and all engagements.

If members fail to contract for engagements as herein prescribed or in any way violate the provisions of this law, such action shall constitute their resignation from membership in such Locals wherein they hold membership, and in the American Federation of Musicians, and they shall be held as unfair to the Federation.

* * * * * * *

Article XII—Transfer Members.

* * * * * *

Sec. 18. * * * * *

Traveling members other than leaders must sign contracts with contractors, members of the A. F. of M.

* * * * * *

Article XIII.

Traveling Orchestras And Members.

Traveling Cards And Tax.

Members Playing Out-Of-Town Engagements.

* * * * * *

Sec. 10 * * * * * *

C. A contractor or leader, as the case may be, in every case before an engagement is played, must submit his contract for same to the Local Union in whose jurisdiction same is played, or in the absence of a written contract file a written statement with such Local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hour of the engagement, as well as the names of the members who will play same and the Locals to which they belong and the minimum

amount of money paid each individual sideman, based on the minimum Local scale.

* * * * * * *

I. In the selecting of the members of the orchestra, the leader or manager of same need not confine himself to the membership of the Local in whose jurisdiction the orchestra is organized.

* * * * * * *

K. All contracts between leaders and members of traveling dance orchestras wherein a specified number of weeks is not named can be cancelled by either party giving two weeks' notice to the other.

L. * * * * * *

A member cannot form a traveling dance orchestra in the jurisdiction of the Local to which he belongs, and make such jurisdiction the headquarters of the orchestra, and compete for and fill local engagements with same.

M. * * * * *

Note—In all else the Constitution, By-Laws and Standing Resolutions of the A. F. of M. shall apply to the members of a traveling orchestra.

* * * * * *

Article XVII—Miscellaneous.

Section 1. Performers on musical instruments of any kind who render musical services for pay are classed as professional musicians and are eligible for membership, subject to the laws of and jurisdiction of the A. F. of M.

* * * * * *

[fol. 817] Mr. Charlton: The plaintiffs offer in evidence plaintiffs' Exhibit B-38, being the July 1944 issue of the International Musician, with particular reference to pages 12 and 14 referred to in the witness' testimony.

Mr. Padway: No objection.

Mr. Cohen: No objection.

The Court: It will be admitted so far as the pages particularly referred to are concerned, and the date of the publication.

Plaintiffs' Exhibit B-38.
Filed in U. S. District Court December 13, 1944.

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Nothing is politically right which is morally wrong.—DANIEL O'CONNELL.

Instead of having the desired effect these distortions only served to solidify our Federation. We have always been a unified organization and can boast that our members were never more loyal than during the past two years. Knowing the truth they stand foursquare behind our President in the realization that he is carrying out the wishes of the rank and file of the membership.

If any evidence were needed that musicians have full confidence in their officers it was furnished by their re-election at our Convention, in Chicago a few weeks ago. (Incidentally—and this came as a surprise to Senator Clark*, father of the Senate Investigation into the affairs of the Federation, who learned of it first during the hearing before the Senate Sub-Committee—our by-laws provide for nomination for office from the floor of the Convention, instead of by an intervening nomination committee, which is the method used in many organizations to control elections by a small group.) Further proof of confidence of members was provided by the following resolutions which were spontaneously introduced and unanimously adopted:

RESOLUTION No. 43.

(This resolution directs that no members play for recordings except in conformity with the existing contracts. It is a mandate to the President and the Executive Board to continue in the same manner as heretofore, and ratification of everything that has been done in the recording situation.)

WHEREAS, The Convention of the American Federation of Musicians, held at Seattle, Washington, in June, 1941, instructed the officers of the Federation to take appropriate action to abolish the evil of unemployment created by the use of mechanized music; and,

WHEREAS, President Petrillo of the Federation reported to the Convention of the Federation at Dallas, Texas, in June, 1942, that the Executive Board was prepared to take action in the matter by terminating all licenses for all musical services in connection with the making and manufacture of recordings and transcriptions, and

WHEREAS, The American Federation of Musicians did on June 21, 1942, send written notice to all persons engaged in manufacturing and making of records and transcriptions to the effect that after August 1, 1942, musicians would no longer work in the making and manufacturing of recordings and transcriptions which had the effect of displacing live musicians; and,

THEREFORE, BE IT RESOLVED, That we, the representative delegates to this Forty-eighth Convention, do hereby give our President a sincere vote of confidence. Be it further resolved, that we delegates concur in all former acts of our honored President. We herewith pray that the rich blessings of God Almighty be upon him, giving him strength, wisdom and understanding that he might continue the great work before him, that of raising the cultural values of the art of music, along with greater opportunities for economic advancement, and the perpetuation of our time-honored Federation.

(Signed): W. H. Bailey (710), Edward W. Bailey (767), Paul L. Howard (767), Fay E. Allen (767), Jack C. White (641), Robert J. Willis (548), Lloyd B. Gist (533), Lloyd V. Plummer (533), John F. Wood (473), Louis Jones (419), Charles S. Exum (242), R. L. Goodwin (550), William Shaw (627), S. S. Melendez (471), Velmer Mason (286), Bernard Mason (543), Edward A. Prettyman (543), Clemon E. Jackson (535), Artie Matthews (814), William Houston (496), J. E. Morton (637), P. S. Cook (462), Musco C. Buckner (208), Harry W. Gray (208), Wm. Everett Samuels (208), J. C. Douglas (675), Calvin A. Shields (632), Chas. Williamson (558), Jesse Hicks (185), Wm. H. Graham (623).

RESOLUTION No. 19.

(This resolution is also a pledge of confidence to our President, calling specific attention to the fact that his actions were the result of instructions of the Convention in Seattle in 1941.)

WHEREAS, We, the members of the Corpus Christi Musicians' Association, Local 644, A. F. of M., have received the written reports of President James C. Petrillo regarding the canned music fight, through the medium of the International Musician, and

WHEREAS, We have learned through the reports of the action he has taken to place before certain groups the right of our membership to be protected, and

WHEREAS, In his reports he has given the officers of the A. F. of M. full credit for their support in this fight, as well as the membership as a whole;

THEREFORE, BE IT RESOLVED, That at this National Convention of the American Federation of Musicians, the delegates present wholeheartedly endorse his reports, his actions, as per instructions of the Forty-sixth Annual Convention of the American Federation of Musicians in Seattle, Washington, and the results he has obtained, and

BE IT FURTHER RESOLVED, That the Convention here assembled give our President a rising vote of thanks and confidence at the time this resolution is adopted.

Convention Gives Unqualified Approval

AFTER the recording ban went into effect on August 1st, 1942, the country was flooded with newspaper articles, editorials and cartoons, all part of an organized campaign of vilification and scurrility against President Petrillo and the Executive Board. The large majority of the attacks were aimed at President Petrillo, making him appear as a dictator who had forced the Federation to do his bidding, notwithstanding the fact that the ban was the result of the insistent demand of our entire membership for relief from the competitive use of recordings by many persons who employed no live musicians yet got the benefit of their services.

In spite of all the attacks, which in the main consisted of prejudiced untruths, the President and Executive Board stood firm in carrying out the mandates of numerous conventions and fought our enemies through the courts, up to the Supreme Court of the United States, which tribunal upheld our position. Then the interests, some of whom never employed a live musician, forced the matter before a sub-committee of the United States Senate and also before the War Labor Board, which latter body has just handed down a decision apparently not in our favor, but which in reality decides nothing.

The hearings before the panel of the War Labor Board developed the interesting fact that the National Association of Broadcasters, generally known as N. A. B. (the majority of whose members employ no musicians in their radio stations), which was not even a party to the proceedings and therefore had no official standing in the case, paid for all the expensive exhibits introduced in evidence in the case by the transcription companies. These consisted of charts and graphs made up of statistics gathered by N. A. B., and it was admitted that N. A. B. had financed the proceedings on behalf of the companies.

It is to be noted that, whereas more than eighty companies who have signed our contracts admit a responsibility for the plight of the musician whose employment is reduced due to mechanical competition and are willing to assist in its alleviation, two recalcitrant companies, though they admit there is such a problem, with callous indifference declare it "none of their business".

Attempts were made to bring discord into our ranks by stories that our President was not acting in the best interests of the members and that our by-laws gave him dictatorial powers, with the intimation that these laws were passed at his instigation, whereas it is well known that they existed long before he became President.

The old game of waving the flag was also indulged in by our enemies. We were supposed to be unpatriotic notwithstanding the facts that nearly one-third of our entire membership is in the armed services, that we have contributed millions of dollars in services for the armed forces and are continuing to do so and that the ban did not hinder the war effort in the least. We continued to make records for the use of the men in service and have many letters from governmental agencies attesting their appreciation of our help.

and the effect of displacing live musicians; and,

WHEREAS, On August 1, 1942, all employment of that character terminated, and no demands were made upon employers, and the same was a complete severance and termination of the employment relationship; and,

WHEREAS, Subsequently, some of the former employers did agree to employ members of the American Federation of Musicians in the making of transcriptions and records upon terms and conditions embodied in certain agreements, one of which is known as the "Decca" agreement, and another is known as the "Four Employer Contract", and the making of said agreements being instigated by Government agencies, and

WHEREAS, Other companies are desirous of employing members of the American Federation of Musicians in the making and manufacturing of records,

NOW, THEREFORE, BE IT RESOLVED, That no member or members of the American Federation of Musicians shall take employment or become employed in the making and manufacturing of records and transcriptions upon terms and conditions different from those prescribed in the "Decca" contract or in the "Four Employer Contract"; and the officers of the American Federation of Musicians hereby stand instructed to refrain from entering into any contracts or agreements with any person, company, or employer who seeks the services of any musicians in the making of records and transcriptions unless such person, company or employer enters into a written agreement with the Federation embodying the same terms and conditions now included in the "Decca" contract and the "Four Employer Contract", and

BE IT FURTHER RESOLVED, That the Convention now in session hereby ratifies and confirms all acts of the officers and the Executive Board of the Federation heretofore taken on the subject referred to in this resolution.

J. K. WALLACE (47).

RESOLUTION OF APPRECIATION

(This resolution was introduced and sponsored by all the colored delegates to the Convention and is further evidence of the unanimity of opinion among the members.)

WHEREAS, In the past two years our honored President, James C. Petrillo, has done everything possible to carry out the mandates of the National Conventions of the A. F. of M., and

WHEREAS, In the course of his activity as President, he has ever been militant in fighting for the common interests of all members of the Federation, regardless of race, creed, color or national origin, and

WHEREAS, In the interest of good faith and fair dealing, we the undersigned, here and now resolve to let the people of our nation know of our feeling toward President James C. Petrillo, our honored Chief Executive, and

WHEREAS, Because of the most unfavorable publicity he has received at the hands of the enemies of organized labor, as well as the press and syndicated newspapers and periodicals, who have sought along with many others, high in the government of our country, to discredit his acts, with the hope of gaining public favor—further to attempt to destroy the high morale of the members of our organization:—

claims and confidence at the time [illegible] adopted.

WILLIAM CLITHEROE (644)
TERRY FERRELL (644)

This should be sufficient answer to those who have been defaming our President. It should prove conclusively that the recording ban is an expression of the will of our entire membership and that the manner in which it has been conducted has its whole-hearted approval.

Public sentiment which was swayed by the misrepresentations of a biased and unfriendly press is turning in our favor, as the truth forces its way into the open. The knowledge that we are right strengthens our purpose to continue the fight until we achieve our goal.

New Laws and Changes

The following are important New Laws and changes in the By-Laws of the American Federation of Musicians, adopted and ratified by the 1944 Convention. They will become effective September 15th, 1944, and all members are directed to govern themselves accordingly.

Conditional Membership Abolished

Due to neutral jurisdictions being eliminated the granting of Conditional Membership has been abolished.

Correction in Transfer Law

Change the words "one week" on line 3 of paragraph 2 of Section 10, Article XII, page 113, to read "two weeks". This corrects the verbiage and makes it consistent with the law.

National Secretary to Notify Locals When Claims Are Filed Against Establishments in Their Jurisdictions

In all instances where claims are entered by out-of-town musicians against establishments in which they have played, the National Secretary's Office shall immediately notify the local of that fact.

Simplifying the Laws of the Federation

The Executive Board has been instructed to codify and simplify the laws and index at the earliest opportunity.

Leaders and Agents Must Notify Local Where They May Be Located

On arrival in the jurisdiction of a local where an engagement is to be played, the leader or his agent must advise the local secretary of the place where the leader and agent may be located.

Changes by President to Be Published

Whenever the President under his powers in an emergency promulgates an amendment to the Constitution or By-Laws such change shall be printed in the first issue of the *International Musician* after the effective date of promulgation.

(Continued on Page Fourteen)

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* While the investigation was supposed to be impartial, Senator Clark assumed the role of prosecutor of President Petrillo. Also strange was the fact that, while the witnesses for the Federation were put under oath, the witnesses against it were not required to conform to this formality. Of such strange things are "Senatorial Investigations made. Senator D. Worth Clark, we might add, was recently defeated for renomination.

Plaintiffs' Exhibit B-38.
Filed in U. S. District Court December 13, 1944.

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One of the musical delights of the Convention period was the pipe organ playing of Mr. F. LeRoy Nelson, a Chicago native son, and member of Local 10 since 1919. His repertoire was as amplitudinous and variegated as the world-wide range of musical composition. Classical, modernistic, and the unusual responded to his touch with equal felicity; and the two daily programs both had large crowds of attentive and appreciative listeners.

It was a pleasure to have A. R. Teta appear upon a national Convention scene once more. For an extended period he has functioned as Chief Supervisor and Inspector of Band Instruments Section, at Atlanta, Georgia. He has relinquished that position to become secretary-treasurer of the United States Army and Navy Bandmen's Association, Inc., where he can be reached through P. O. Box 1826, New Haven, Connecticut. To meet him again was to span once more past years through which he has come apparently hale and hearty and zealous in the cause in which he has been so long engaged.

Many delegates propounded the query, "Where will we go from here?"

To appreciate how Chicago has grown, one should read a description of the city at the time Abraham Lincoln was first nominated for the Presidency in the Wigwam, which had been erected for that historic event, in 1860.

Anyone carrying the patronymical embellishment of Désiré DeFauw must be endowed with a high-grade of genius. The one we have in mind is surely in that class. We refer to the new conductor of the Chicago Symphony Orchestra. This great organization had its foundations laid under the leadership of Theodore Thomas. When Thomas passed away, the viola player in the orchestra, "to fortune and to fame unknown", was called to the position thus vacated. As usual there

NEW LAWS AND CHANGES

(Continued from Page Twelve)

Charter to Lapse When Local Membership Becomes Less Than Fifteen

When the membership of any local becomes less than fifteen bona fide members in good standing the charter of such local shall automatically lapse and the members in good standing of such local shall have the right to join the nearest local without payment of initiation fee.

Leader to Be Permitted to Cancel Management Contract If Average Earnings Are Not Maintained

Compliance with the twenty weeks within six months work provision required by Federation contracts shall be deemed fulfilled by booking agents only if the latter shall have offered the artist twenty weeks engagements within each six months period at a scale in reasonable conformity with the average earnings of the artist during the preceding six months period.

New Opera Scale Where Price of Choicest Seat Does Not Exceed $4.00 and Also Where It Does Not Exceed $3.00

Section 5 of Article XIII is changed from ". . . each week, per man, $100.00" to read ". . . each week, per man, $115.00".

Section 6 of Article XIII is changed from ". . . does not exceed $2.00, . . . each week, per man, $85.00" to read ". . . does not exceed $3.00, . . . each week, per man, $100.00."

A new Section 7 is added providing "Where the price of the choicest seat (exclusive of box seats) does not exceed $2.00, for not more than seven performances each week, per man, $90.00."

To the third line on page 137 add "Section 7, pro rata".

person, company, or employer who seeks the services of any musicians in the making of records and transcriptions unless such person, company or employer enters into a written agreement with the Federation embodying the same terms and conditions now included in the "Decca" contract and the "Four Employer Contract".

The Convention now in session hereby ratifies and confirms all acts of the officers and the Executive Board of the Federation heretofore taken on the subject referred to in this resolution.

A New Law Designating Through Whom Members May Accept Engagements

Members of the American Federation of Musicians are permitted to solicit, negotiate or accept engagement to play in bands or orchestras ONLY from employers who engage or employ them through a leader, another member, or other persons, who for this purpose shall be considered the agent or agents of such employer. Provided that members may contract personally with a symphony orchestra management.

If a member violates this section the violation shall constitute and be considered as his resignation from the American Federation of Musicians and the local or locals in which he holds membership.

Taverns and Inland River Boats Added to Traveling Engagements Under Article XIII

Taverns and inland river boats are added to the type of engagements which are considered traveling engagements and should be added to the word "inns" on lines 11 and 20 on page 121, Article XIII.

Traveling Members Must Be in Possession of a Membership Card or Receipt

Article XIII formerly provided that trav-

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great organization had its foundations laid under the leadership of Theodore Thomas. When Thomas passed away, the viola player in the orchestra, "to fortune and to fame unknown", was called to the position thus vacated. As usual there were lifted eyebrows of apprehension, whisperings of suspicious dissent, and clamorous tongues opining that the young Frederick Stock would never do. Well, he did do for something like a third of a century; and brought this notable company of instrumentalists to a world-wide fame. Stock's hour of translation came and the new conductor, above named, assumed the baton of leadership. Some of Chicago's tinsel-winged newspaper critics are filling their allotted space with the barbed-wire tips of their high and lofty animadversions. We venture to say that the one and one-half hour concert given by the Chicago Symphony Orchestra on the opening day of the recent Convention, was looked upon by delegates and visitors as a great event, an enriching experience, and that the new man at the helm made a profound and lasting impression. All hail to Désiré DeFauw!

Color is not a handicap to Marian Anderson. Modestly and with calm poise her very soul seems to lift upward on the wings of song. It is no exaggeration to say that she held her convention audience spellbound. Her recalls were numerous. She was generous in response. Long may she live to make her inspiring contributions of melody to all races of the world.

Local 10 was determined to see to it that there was no lack of fine band and orchestra music. Think of crowding into a single week such an array of high-class musical organizations as the following:

Chicago Symphony Orchestra, Director, Désiré DeFauw.

Dyett's Concert Band, Leader, Captain Walter Dyett.

Women's Symphony Orchestra, Conductor, Jerzy Bojanowski.

Cavallo's Symphonic Band, Director, Peter A. Cavallo.

Board of Trade's American Legion Band, Leader, Colonel Armin F. Hand.

Red Saunders and his Band, Leader, Red Saunders.

With eminent propriety this might have been called "A week of musical saturation". Inspiring, glorious, memorable!

Too bad the blackguard and character-assassinating press could not have heard President Petrillo's address and the ovation accorded him on the opening Convention day. However, it is difficult to make impressions on empty skulls.

What thanks we owe to officers and men
For giving us a week we'll ne'er forget!
But language fails us—much to our regret!
Our hats are off to Local No. 10!

clusive of box seats) does not exceed $2.00, for not more than seven performances each week, per man, $90.00."

To the third line on page 137 add "Section 7, pro rata".

Change the seventh line on page 137 which now reads "Sections 5 and 6—$2.00 per hour or less" to read "Sections 5, 6 and 7—$2.00 per hour or less".

Change line 21 on page 137 which now reads: "Sections 5 and 6—not less than $66.00 for one or two rehearsals per day" to read "Sections 5, 6 and 7—not less than $66.00 for one or two rehearsals per day".

Contracts of Employment Must Contain the Following New Clauses:

"Any member or members who are parties to or affected by this contract, whose services thereunder or covered thereby, are prevented, suspended or stopped by reason of any strike, ban, unfair list order or requirement of the Federation shall be free to accept and engage in other employment of the same or similar character, or otherwise, for other employers or persons without any restraint, hindrance, penalty, obligation or liability whatever, any other provisions of this contract to the contrary notwithstanding."

'All contracts of any character or nature for the rendition of musical services are subject to all the existing and future provisions of the Federation's Constitution, By-Laws, Rules and Regulations, and all amendments thereto, all of which are made part hereof, with the same force and effect as if they were incorporated herein in full, and in the event of any inconsistency or conflict the provisions of such Constitution, By-Laws, Rules and Regulations shall control."

Members Are Not Permitted to Take Employment for Recordings Under Conditions Different From Those Prescribed by Present Federation Recording Contracts

No member or members of the American Federation of Musicians shall take employment or become employed in the making and manufacturing of records and transcriptions upon terms and conditions different from those prescribed in the "Decca" contract or in the "Four Employer Contract"; and the officers of the American Federation of Musicians hereby stand instructed to refrain from entering into any contracts or agreements with any

Traveling Members Must Be in Possession of a Membership Card or Receipt

Article XIII formerly provided that traveling members produce a paid-up card. The law has now been changed so that members must on demand produce either a membership card or a receipt showing current quarter paid in local or locals in which they hold membership.

Fifth War Loan

Two resolutions were introduced having to do with the purchase of War Bonds. A substitute for these resolutions recommended by the committee and passed by the Convention urged and recommended that the American Federation of Musicians and all of its locals and members purchase War Bonds to the fullest extent of their ability to pay.

Locals to Receive Share of Radio Tax

Article X, Section D, Paragraph 2, is amended to provide that 20 per cent of the radio tax collected thereunder is to be returned to the local and 80 per cent to be retained by the Federation.

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[fol. 819] Q. Now, Mr. Hild, in the course of your discussion at the Miami session in 1941, did anyone state that any ballroom owner had appeared or attended sessions between Mr. Petrillo and the Treasury Department which were had in Washington during the prior sessions?

A. No.

Q. You did not understand that any representative of the ballroom owners was there? A. I did not.

Q. Nor that any representative of the movie industry was there? A. I did not.

[fol. 820] Q. Or the radio industry? A. No.

Q. Or anybody in the entertainment world other than Mr. Petrillo and the Union's lawyer, is that correct?

A. I understood that no one was there except them.

Q. Mr. Hild, have you been in Iowa before?

A. Oh, yes.

Q. Did you ever have occasion to call on Mr. Geer?

A. No.

Q. Or Mr. Bartels? A. No.

Q. Never seen their places of business? A. No, sir.

Q. Never saw any of the ballrooms where at performances involved in this case were had? A. No, I did not.

Q. Never met those gentlemen prior to today?

A. Never.

Q. You are not generally acquainted with the musicians, the rank and file of musicians in this territory, are you?

A. A few.

Q. You know Mr. Weaver, of course?

A. That is true.

Q. And perhaps the president of the Local Union here?

[fol. 821] A. That is true.

Q. Can you give the name of any other members of the Local Union other than the president?

A. Here?

Q. Yes.

A. No. I know the orchestra leader at one place here.

Q. You cannot name the president of the Local Union at Fort Dodge, Spencer, or Dubuque?

A. No, not offhand.

Q. You had a brief career as a sideman on a band?

A. I had a brief career as a sideman and a brief career as a leader, very brief.

Q. That was quite a good many years ago? A. Ye

Q. When did you last have employment as a sideman in an orchestra? A. 1929 or '30.

Q. Fourteen or fifteen years ago?

A. That is correct.

Q. And was that about the time when you had your last engagement as a leader?

A. No, that occurred much prior to that, 1923, '24 or '22, or thereabouts.

Q. You are not personally acquainted with any of the men who appeared as witnesses in this case yesterday? [fol. 822] A. No, I am not.

Q. Any of the day before? A. I am not.

Q. You do not know any of the band leaders who have been mentioned in the testimony in this case?

A. Not only by reputation, by virtue of my position.

Q. Not personally? A. No.

Q. You could not name personally any of the sidemen on any of those bands, could you?

A. No, I could not.

Q. Do not recall having any conversation with either the leaders or sidemen of any of those bands prior to now, do you? A. No.

Q. Of course you never played on any of those bands?

A. I did not.

Q. By band, you understand it referred to orchestras; the terms are used interchangeably, are they not?

A. Yes.

Q. You do not know, as of your own personal knowledge, anything concerning the method of performing adopted by these bands, by observation or from conversation with the members or leaders?

[fol. 823] A. From either of those sources, no.

Q. Of course you were not in attendance at any of the performances involved in this case? A. No, I was not.

Q. Had nothing to do with any of the engagements leading up to those performances? A. No, I did not.

Q. And do not know what was done at the performances? A. No.

Q. Don't know anything that was done in connection with the booking of them, do you? A. No, I don't.

Q. Now the statement that you made as to what you believed the members of the Union were required, or not

required to do, was your opinions of the meanings of the By-Laws and Constitution only, were they not?

A. That is correct.

Q. And you cannot recite verbatim any single By-Law of the Union, can you?

A. I might be able to pick up one that I might recite verbatim.

Q. You do not understand that the Union is a party in this case, do you?

A. A party in the case directly, no; an interested party, [fol. 824] yes.

Q. You are interested as a spectator? A. I am.

Q. You are not a party?

A. I would not deem myself such.

Q. You know, of course, the American Federation of Musicians is not a party to the case?

A. I assume under legal language that is true, yes.

Q. The Union does not appear as a contracting party, you understand that, on any of the Form B contracts referred to in evidence? A. I understand that.

Mr. Charlton: At this time, Your Honor, the plaintiffs move to strike all of the testimony of the witness Oscar Hild purporting to state the terms of any formal action taken by the International Executive Board of the American Federation of Musicians with reference to instructions or directions given by that Board to Petrillo, for the reason that it affirmatively appears that the witness' testimony is not the best evidence, it now appearing affirmatively in the record that such action was recorded and evidenced by a writing officially made, recorded and in existence.

The Court: Why, I think that should be overruled. How- [fol. 825] ever, I will make a ruling on it later.

Mr. Charlton: Now, Your Honor, further the plaintiffs move to strike all the testimony of the witness Oscar Hild purporting to state the terms of any formal action taken or describing or setting forth the effect of any formal action taken by the International Executive Board of the American Federation of Musicians with reference to instructions or directions given by that Board to James C. Petrillo, and for the same reasons stated in the previous motion.

This motion, Your Honor, intends to go further and strike the testimony of the witness as to the effect of such formal action to the extent that he so tesified.

The Court: It would not go any further than that. You are limited to that part of his testimony which tended to give his opinion as to the effect?

Mr. Charlton: Yes.

The Court: Well, I have already indicated what I think about it, but I will let it stand to be ruled on later. (Complainants except.)

Mr. Charlton: Now, if the court please, the plaintiffs move to strike all of the testimony of the witness Oscar Hild purporting to state the terms of any order of James C. Petrillo made at any time prior to the dates of the en-[fol. 826] gagement involved in this case, purporting to deal with the subject matter of revision or changes in By-Laws of the American Federation of Musicians, for the reason that the testimony of the witness is not the best evidence, constitutes the opinion and conclusion of the witness, and for the reason that it now appears in the record affirmatively that such action was recorded and evidenced by a writing officially made and in existence at this time.

The Court: Well, as to that I think oral evidence is admissible. Of course where it is taken and there is a writing in the hands of the other party it casts a great doubt upon its correctness. But, I understand, if I remember the rule, you can testify to what happened in a meeting, for what it is worth.

Mr. Charlton: I call your attention to the fact that my motion is narrower than conversation or other events of the meeting.

The Court: I will reserve a ruling on that at least until after the close of the direct examination.

Mr. Charlton: I think that is all of the cross-examination, Your Honor.

The Court: Any redirect examination?

[fol. 827] Redirect Examination.

By Mr. Joseph A. Padway:

Q. You were asked, Mr. Hild, this morning by Mr. Charlton whether there was any minutes of meetings. I

have here the convention proceedings 1941, Seattle, Washington, June 9-14, 1941, I refer now to the page which is entitled "Minutes of the International Executive Board, Palmer House, Chicago, Illinois, December 5, 1940," contained in exhibit 8 of the proceedings, and without reading it unless the court and counsel wants me to, I call your attention to the fact that a special meeting was called by President Petrillo to report to the Executive Board the result of his conferences with the attorney of the U. S. Treasury Department in Washington with reference to the responsibility of members of the Association with reference to the Social Security Act. President Petrillo explained the present statutes and the situation became so great that it became necessary to have a special meeting of the Executive Board for the purpose of trying to find some definite purpose which will enable our members and leaders to know their exact position. Now that became a general discussion, did it not?

A. There must have been, yes.

Q. Well, were you present at that meeting?

[fol. 828] A. Yes, I was present.

Q. Do you recall the general discussion of this matter?

A. I recall many discussions of these matters, and I have assuming from the minutes it was on December 5th.

Q. That is the Chicago meeting, the last of the year?

A. Yes.

Q. In those discussions, not indicated here very definitely, was the matter of the policy respecting status discussed?

Mr. Charlton: Objected to as immaterial and irrelevant and not proper redirect examination, and calling for the opinion and conclusion of the witness, and not the best evidence.

The Court: Sustained. It is calling for his opinion as to whether the policy was discussed. (Intervener excepts.)

Q. No, policy of the status of—Well, I will withdraw it and put it this way: Was a discussion had by the Board respecting the relationship of the leader and sidemen to the establishment contracting with them?

Mr. Charlton: Is that a yes or no question?

Mr. Padway: Yes or no question.

A. Yes, sir.

Q. Was there anything there said respecting the vest-[fol. 829]-ing of control over the methods and means of service to be rendered by these bands discussed?

Mr. Charlton: Objected to as immaterial and irrelevant, and not proper redirect examination, and as hearsay, and as calling for conversations and events in no manner binding on the plaintiffs, and irrelevant.

The Court: Overruled. You may answer by yes or no. (Plaintiffs except.)

A. Yes.

Q. What was said there respecting it?

Mr. Charlton: Objected to as hearsay.

The Court: Sustained. (Intervener excepts.)

Q. Did that discussion and subsequent discussions at Miami on that subject culminate in the adoption of the Form B contract?

Mr. Charlton: Objected to as calling for the opinion and conclusion of the witness, immaterial and irrelevant.

The Court: Overruled. I think we ought to know about that. Answer, please. (Plaintiffs except.)

A. Yes.

Mr. Padway: No further examination.

Mr. Cohen: No questions.

Mr. Charlton: No questions. —Witness Excused—

[fol. 830] The Court: I will pass the ruling on the three motions made at the close of the testimony of the witness until after the testimony is closed.

[fol. 831] Paul Moorhead, recalled as a witness on behalf of the Intervener, testified as follows:

Direct Examination.

By Mr. Joseph A. Padway:

Q. Mr. Moorhead, you heard Mr. Bartels testify yesterday, didn't you? A. Yes, sir.

Q. You have been employed by him?

A. No, I beg your pardon. I did not.

Q. I beg your pardon, Mr. Geer.

A. That is right.

Q. You and your band have been employed by his establishment? A. Yes.

Q. And the contracts have been here in evidence, haven't they? A. That is right.

Q. As he testified himself, do you know to your knowledge, has he ever played music?

A. Yes. He used to have an orchestra, and used a saxophone.

Q. He had a pretty good one.

A. I never heard him.

Q. You mean you never heard a good saxophone?

A. I never heard Mr. Geer.

[fol. 832] Q. In working for Mr. Geer and his establishment the contract calls for your working at a specified time? A. Yes.

Q. And quit at a specified time? A. Yes.

Q. With intermissions taken? A. Yes, sir.

Q. Who designated the intermissions?

A. Mr. Geer.

Q. Mr. Geer asked you to diversify your music as to what to include, for instance, did he ever ask you to include waltzes of a certain kind he wanted you to play?

A. Yes, sir.

Q. What was his request of you respecting waltzes?

A. It was on the hour, every hour at Mr. Geer's establishment.

Q. That was the rule that he promulgated to you?

A. Yes, sir.

Q. Now then, did he have a loud speaker system?

A. Yes, sir.

Q. Did you have loud speaker systems?

A. Yes, sir.

Q. Did he use his loud speaker system?

A. Generally we used both of them.

Q. Now if he told you not to use yours and use only his [fol. 833] would you obey his direction?

Mr. Roberts: Objected to as a self-serving declaration, incompetent, irrelevant and immaterial.

The Court: Sustained. (Intervener excepts.)

Q. Did Mr. Geer ever give you an order, instruction or direction which you refused to obey?

Mr. Roberts: The same objection.

The Court: Overruled. (Plaintiffs except.)

A. No.

Q. What is the answer? A. I said no.

Q. Do you know whether he ever gave any instruction, direction or order to any of the sidemen which they refused to obey?

A. I don't think he had any dealings with the sidemen.

Q. Did you prohibit him from dealing with the sidemen?

A. No.

Q. Did you in any manner limit his right to give you orders respecting the method, manner or means of performance of your work, or the sidemen?

Mr. Roberts: Objected to as calling for an opinion and conclusion.

The Court: No, I think that part is all right. It is negative testimony, however. You may answer. Plaintiffs except.)

[fol. 834] A. What is the question?

Q. (Question read by the reporter.)

A. No.

Q. You are familiar with the Form B contract?

A. Yes, sir.

Q. Did you use the Form B. contract?

A. Yes, sir.

Q. What did you understand to be your duty toward Mr. Geer in the use of Form B contract, or under the Form B contract, respecting his right to give you orders as to the method, manner or means of performing the work?

Mr. Roberts: Objected to as immaterial and irrelevant.

The Court: Overruled. (Plaintiffs except.)

A. When we—let's start again. When we were working for Mr. Geer we respected him as the boss man, and what Mr. Geer wanted we did to the best of our ability, probably not so good.

Q. What he wanted you would do?

A. That is right, if we could.

Q. You held yourself then ready to obey his orders regarding the work and the performance of it?

A. That is right.

Q. Did you ever work for Mr. Bartels?

A. Yes, sir.

[fol. 835] Q. Did you have the same form of contract with Mr. Bartels? A. That is right.

Q. Is the same true with respect to Mr. Bartels that you held yourself ready to obey his instructions with respect to the manner, method and means of performance of the work? A. That is right.

Q. Did you ever refuse to obey an order or instruction of Mr. Bartels? A. No.

Q. Now there is something about copyrighting of music that enters into a performance of the character you rendered, is there not? That music is copyrighted, do you know that? A. I don't follow you.

Q. Would it be clear if I said to you copyrighted music can only be played with the permission of those who own the copyright? A. That is right legally.

Q. Who obtains the permit for the use of that copyrighted music, you, Mr. Bartels or Mr. Geer?

A. The purchaser of the music.

Q. That is a fact that it must be obtained by Mr. Geer or Mr. Bartels the right to use whatever copyrighted music you play, a permit must be obtained by Mr. Bartels and [fol. 836] Mr. Geer?

Mr. Roberts: Objected to as incompetent, leading.

Q. You use copyrighted music, don't you? A. Yes.

Q. Permits must be obtained for the use of that copyrighted music? A. Yes.

Q. Who obtains those permits?

A. The ballroom operator.

Q. For instance in your contract with Mr. Geer would it be Mr. Geer? A. Yes.

Q. And in the instance of Mr. Bartels would it be Mr. Bartels? A. That is right.

Q. The occasion on which you were short a piano player there was corrected by the engagement of a lady, the name, I believe was given as Mary Bodenstine. Do you recall that? A. Yes.

Q. Who procured Miss or Mrs. Bodenstine?

A. We came into town and must have talked to Mr. Geer and said we were short a pianist, and in some manner when I went on the job the pianist was there. I don't know, [fol. 837] there was some conjecture as to how she happened to be there, but when I walked into the ballroom she was sitting at the piano, the first time I had ever seen her.

Q. Was she one of your band or troop?

A. I had never seen her before. No.

Q. Did you engage her? A. No.

Q. She played with the orchestra?

A. She played that night.

Q. And when she played you understood her to be playing at Mr. Geer's request?

Mr. Roberts: Objected to as the witness is not shown competent. He has already testified that he does not know how she got there.

The Court: Overruled. (Plaintiffs except.)

A. I say that I did not contact her to come there.

Q. Did any of the sidemen? A. No.

Q. Well she could come only from one other place, the management; is that right?

Mr. Roberts: Objected to as calling for the conclusion and opinion of the witness; leading and suggestive.

The Court: Sustained. (Intervenor excepts.)

[fol. 838] Q. Now did you object to her playing with you that night? A. No.

Q. If either Mr. Geer or Mr. Bartels would have requested you on either of the nights you played for them under this Form B contract to have discharged a member or members of your orchestra would you have done so?

Mr. Roberts: Objected to as a selfserving declaration, incompetent, irrelevant and immaterial.

The Court: You may answer. (Plaintiffs except.)

A. I would have removed them from the stage.

Q. By that you mean you would not have permitted that person to have played for that performance?

A. Yes, sir; if he didn't want him on the stage, that's all.

Mr. Padway: You may cross-examine.

Cross-Examination.

By Mr. Thomas B. Roberts:

Q. As a matter of fact you would have given that man two weeks notice, wouldn't you, Mr. Moorhead, to get out of the band?

A. The point comes up there that if he didn't want him, he was still there and he would have to be paid if he didn't want him on the stage.

Q. You would still pay him?

A. Mr. Geer. It is always the booking office that pays.

[fol. 839] Q. This sideman you mentioned, you would have paid him?

A. I presume that would be necessary.

Q. That is, whether Mr. Geer wanted him or not; is that right? A. Yes.

Q. Now you mentioned Mrs. Bogenstine, you paid her, didn't you; you paid her $2.00 above the union scale?

A. I did. The union scale is very small.

Q. What is it up there? A. $5.00.

Q. You paid her $7.00? A. Yes, sir.

Q. You determined that rate; is that right?

A. Yes.

Q. You have heard of the American Society of Composers, Authors and Publishers?

A. Yes, sir.

Q. That is commonly known as ASCAP?

A. Yes, sir.

Q. You do not know the background as to how it came about that ASCAP licenses are required of ballrooms, do you?

A. Yes, I know how it came about.

Q. How did it?

A. It is a long speech.

Q. Well, some rule of ASCAP, is that right?

[fol. 840] A. Yes, to collect more money for the writers.

Q. For ASCAP. But you don't know anything about the arrangements that ASCAP might have had with either Mr. Geer or Mr. Bartels, do you?

A. No, I don't.

Q. What can you tell the court as to whether the next night following this engagement in which Mary Bogenstine played the piano that you played at the Crystal Ballroom the following night?

A. We did not play there the following night.

Q. Did you play in Des Moines the next night?

A. No; the following Saturday.

Q. You were short a piano player that night?

A. That is right.

Q. And did you get somebody to play the piano?

A. No.

Q. Isn't it true that you talked to some local player here?

A. I had a man call and try to locate somebody, it was Saturday night, and halloween, they were all working.

Q. But you had somebody call and try to locate someone?

A. Tried to fill it up to the number.

Mr. Roberts: I believe that is all.

Mr. Padway: That is all, Mr. Moorhead.

Witness Excused.

[fol. 841] Mr. Roberts: We served a notice to take the deposition of Jules Herman whom the record shows was one of the sidemen with Griff Williams' orchestra. The subpoena was served upon Mr. Herman, and he advised counsel for the parties that he was going to be out of town and would be unable to appear, he was going from Chicago to Washington, so the plaintiffs secured a short statement as to what he would testify to if he was called as a witness, and I also understand that the interveners procured a statement, and it has been agreed between counsel that we might stipulate that if Jules Herman were called and sworn as a witness in this cause, that is, the case of Bartels et al., versus Birmingham, that he would testify as follows:

I, JULES HERMAN, hereby state that during the time I was a member of Griff Williams' orchestra I always received from Griff Williams as compensation for my services in performing one night engagements as such member an amount in excess of the scale of wages of the American Federation of Musicians Local in whose jurisdiction such engagement was played; that the amount which I received

for my services as a member of Griff Williams' orchestra during its engagement at the Crystal Ballroom at Dubuque, Iowa, on September 1, 1941, was not less than Thirteen Dol-
[fol. 842] lars and Fifty Cents $13.50.

Mr. Cohen: If the court please, it was my understanding that the statement of Jules Herman was to include the supplement statement which the intervener obtained. The supplemental statement is as follows:

I, Jules Herman, hereby desire to make a further and an explanatory statement to that signed by me on the 5th day of December 1944, as follows:

For one night engagements, compensation for my services was delivered to me by Griff Williams during the time I was a member of the Griff Williams Orchestra. For many hotel engagements, specifically for engagements at the Palmer House in Chicago, played during the years 1941, 1942 and from March 17, 1943, through January 8, 1944, while a member of the orchestra, I received compensation for my services direct from the Palmer House.

During the time I was with the Griff Williams orchestra, I had no agreement written or oral which guaranteed employment for me and my income varied according to the number, type and length of the various engagements played by the orchestra.

Mr. Roberts: If the court please, we would like to object to the testimony contained in the last statement as immaterial and irrelevant.

[fol. 843] The Court: We will take it subject to the objection. (Plaintiffs except)

Mr. Roberts: It is hereby stipulated by counsel for the respective parties in this case as follows:

That Exhibit B-40 is a true and correct photostatic copy of a contract delivered by Music Corporation of America to the Palmer House, Chicago, Illinois, dated October 27, 1941, and covering an engagement by Griff Williams and his orchestra in the Empire Room in said Palmer House, which contract bears the genuine signature of Griff Williams.

That Exhibit B-41 is a true and correct photostatic copy of a contract delivered by Music Corporation of America to

the Copley Plaza, in Boston, Mass., dated January 15, 1942, and covering an engagement by Griff Williams and his orchestra at said Copley Plaza Hotel for the period from March 21, 1942 through April 30, 1942, which contract bears the genuine signature of Griff Williams.

That Exhibit B-42 is a true and correct photostatic copy of a contract delivered by the Music Corporation of America to the Inglaterra Ballroom, Peoria, Illinois, dated December 21, 1943, covering an engagement by Griff Williams and his orchestra at said ballroom, which contract bears the genuine signature of Griff Williams.

[fol. 844] That Exhibit B-43 is a true and correct photostatic copy of a contract delivered by the Music Corporation of America to the Baker Hotel, Dallas, Texas, dated May 22, 1942, for an engagement by Griff Williams and his orchestra at said Baker Hotel, which contract bears the genuine signature of Griff Williams.

That Exhibit B-44 is a true and correct photostatic copy of a contract delivered by the Music Corporation of America to the Palmer House, Chicago, Illinois, dated November 16, 1942, and covers an engagement by Griff Williams and his orchestra at said Palmer House.

It is further stipulated that Exhibits B-40, B-41, B-42, B-43 and B-44 shall be treated for all purposes the same as though each exhibit were the original contract of which it is a photostatic copy, and they are offered in evidence.

The Court: Any objection to those?

Mr. Padway: No.

The Court: All right. They are admitted.

Mr. Roberts: The purpose is to impeach some of the testimony that is in the deposition of Griff Williams. In the deposition Griff Williams testified that at the various hotels he listed the sidemen and identified the engagements as these particular contracts themselves.

Contract Blank

MUSIC CORPORATION OF AMERICA

MBL:D W

16 Old Bond St., W.1. LONDON Phone Regent 6508 | 745 Fifth Avenue NEW YORK Phone Wickersham 2-8800 | 430 N. Michigan Ave. CHICAGO Phone Delaware 1100 | M C A Building BEVERLY HILLS Phone Bradshaw 22211 | 111 Sutter Street SAN FRANCISCO Phone Exbrook 9822 | Union Commerce Bldg. CLEVELAND Phone Cherry 6910 | Tower Petroleum Bldg. DALLAS Phone 2-1469

THIS CONTRACT for the personal services of musicians, made this 27th day of OCTOBER, 1941

between the undersigned employer (hereinafter called the employer) and THIRTEEN musicians (hereinafter called (including Leader)
employees) represented by the undersigned representative.

[illegible] the employer and the musicians [illegible] and the employer

as

le This contract is subject to cancellation by the Palmer House only, upong sixty days prior notice to the opening date, in writing to the Music Corporation of America.

Plaintiffs' Exhibit B-40.
Filed in U. S. District Court December 13, 1944.

633

It is also understood and agreed that if Thanksgiving comes within the duration of this contract, the Tea Dance Session will be played at Scale.

Price agreed upon $1000.00 per week
(Terms and amount)

To be paid WEEKLY
(Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer PALMER HOUSE — Accepted by Employer [signature] ED LALLES

Street Address STATE AND MONROE — Accepted _____ (Orchestra Leader)

City or State CHICAGO, ILLINOIS — By MUSIC CORPORATION OF AMERICA (Representatives of Employers)

Phone _____ — By [signature]

FORM B.

NAMES OF EMPLOYERS	LOCAL NUMBER	S. S. NUMBER	WAGES
(Leader)			

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
(Leader)			

Plaintiffs' Exhibit B-40.
Filed in U. S. District Court December 13, 1944.

635

Plaintiffs Exhibit B
12-12-44
H L K

FILED
DEC 13 1944
N. T. Reed
CLERK

Contract Blank

MUSIC CORPORATION OF AMERICA

16 Old Bond St., W 1	745 Fifth Avenue	430 N. Michigan Ave	M C A Building	111 Sutter Street	Union Commerce Bldg.	Tower Petroleum Bldg.
LONDON	NEW YORK	CHICAGO	BEVERLY HILLS	SAN FRANCISCO	CLEVELAND	DALLAS
Phone Regent 8508	Phone Wickersham 2-8900	Phone Delaware 1100	Phone Bradshaw 23211	Phone Exbrook 8922	Phone Cherry 6010	Phone 2-1468

THIS CONTRACT for the personal services of musicians, made this 15 day of January, 1942

between the undersigned employer (hereinafter called the employer) and Thirteen (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of GRIFF WILLIAMS, according to the following terms and conditions:

RIDER

Hotel agrees to provide and maintain network broadcasting facilities for at least two network broadcasts per week and to pay all Union taxes incidental thereto, direct to the Union, such cost not to exceed a total of $100.00 per week.

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Filed in U. S. District Court December 13, 1944. Plaintiffs' Exhibit B-41.

liability for the amount stated herein.

Name of Employer Mr. Chauncy De Pew Steele

Street Address Copley Plaza Hotel

City or State Boston, Mass.

Phone

FORM B

Accepted by Employer

Accepted (Orchestra Leader)

By MUSIC CORPORATION OF AMERICA
(Representatives of Employers)

By

637

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
(Leader)			

Plaintiffs' Exhibit B-43.
Filed in U. S. District Court December 13, 1944.

647

Pltfs Exhibit B-43
12/12-44
HEB

FILED
DEC 1 : 1944
N. T. Reed
CLERK

NAMES OF EMPLOYEES	LOCAL NUMBER	S. S. NUMBER	WAGES
_____ (Leader)			

Contract Blank

JB:JA

MUSIC CORPORATION OF AMERICA

16 Old Bond St., W.1. LONDON Phone Regent 6606 | 745 Fifth Avenue NEW YORK Phone Wickersham 2 8900 | 430 N. Michigan Ave. CHICAGO Phone Delaware 1100 | M C A Building BEVERLY HILLS Phone Bradshaw 2121 | [illegible] SAN FRANCISCO Phone [illegible] | [illegible] CLEVELAND | [illegible] DALLAS Phone 2-[illegible]

THIS CONTRACT for the personal services of musicians, made this 21ST day of DECEMBER 194 3

between the undersigned employer (hereinafter called the employer) and FOURTEEN (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of GRIFF WILLIAMS AND HIS ORCHESTRA, according to the following terms and conditions:

Place of employment INGLATERRA BALLROOM, PEORIA, ILLINOIS

Date(s) of employment SUNDAY, JANUARY 16TH, 1943

Hours of employment 8:00 - 12:00

Price agreed upon $600.00 OR 60% OF THE GROSS RECEIPTS WITH A MINIMUM GUARANTEE OF $600.00. IT IS UNDERSTOOD BAND IS NOT TO RECEIVE LESS THAN $600.00 (Which price includes expenses agreed to be reimbursed by employer in accordance with a schedule to be furnished the employer on or before date of engagement.)

To be paid $300.00 DEPOSIT: BALANCE BY 11 PM NIGHT OF ENGAGEMENT (Specify when payments are to be made)

[illegible] will render under the specifications

Filed in U. S. District Court December 13, 194

Plaintiffs' Exhibit B-42.

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract. Music Corporation of America acts hereunder only as agent and assumes no liability hereunder to anyone.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claims is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Name of Employer INGLATERRA BALLROOM
by Harold Newsam

Street Address 914 Main Street

City or State Peoria, Illinois

Phone

FORM B

Accepted by Employer Harold Newsam

Accepted (Orchestra Leader)

On behalf of

Approved By MUSIC CORPORATION OF AMERICA
(Representative of Employer)

By

Plaintiffs' Exhibit B-42.
Filed in U. S. District Court December 13, 1944.

641

Contract Blank

MUSIC CORPORATION OF AMERICA

16 Old Bond St. W. 1	745 Fifth Avenue	430 N. Michigan Ave.	M C A Building	111 Sutter Street	Union Commerce Bldg.	Tower Petroleum Bldg.
LONDON	NEW YORK	CHICAGO	BEVERLY HILLS	SAN FRANCISCO	CLEVELAND	DALLAS
Phone Regent 6506	Phone Wickersham 2-8900	Phone Delaware 1100	Phone Bradshaw 23211	Phone Exbrook 8922	Phone Cherry 6010	Phone 2 1448

THIS CONTRACT for the personal services of musicians, made this 22nd day of MAY, 194 2.

between the undersigned employer (hereinafter called the employer) and Thirteen (including Leader) musicians (hereinafter called employees) represented by the undersigned representative.

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of GRIFF WILLIAMS, according to the following terms and conditions:

Place of employment BAKER HOTEL

Date(s) of employment BEGINNING JULY 3, 1942, FOR FOUR (4) WEEKS.

Hours of employment Luncheons- 12 noon to 2 PM Mons. thru Fris. 12:30 to 2:30 PM Sats. None on Suns. DINNERS - 7:30 PM to 9:30 PM nightly. SUPPERS: 10 PM to 1:00 AM except Suns. Dinner Sundays from 10 PM to 12 Midnight.

Price agreed upon $ 1,500.00 WEEKLY - PLUS THREE (3) ROOMS. (Terms and amount)

To be paid WEEKLY (Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claims is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Plaintiff's Exhibit B-47, Filed in U. S. District Court December 13

Name of Employer BAKER HOTEL

Street Address

City or State DALLAS, TEXAS

Phone

Accepted by Employer

By: CLINTON BAKER

Accepted

(Orchestra Leader)

By MUSIC CORPORATION OF AMERICA
(Representatives of Employees)

By

Plaintiffs' Exhibit B-43.
Filed in U. S. District Court December 13, 1944.

645

Contract Blank

MUSIC CORPORATION OF AMERICA

6 Old Bond St. W. 1 — LONDON — Phone Regent 4666
745 Fifth Avenue — NEW YORK — Phone Wickersham 2 8900
430 N. Michigan Ave. — CHICAGO — Phone Delaware 1100
M C A Building — BEVERLY HILLS — Phone Bradshaw 73211
111 Sutter Street — SAN FRANCISCO — Phone Exbrook 0922
Union Commerce Bldg. — CLEVELAND — Phone Cherry 4849
Tower Petroleum Bldg. — DALLAS — Phone 3-1448

THIS CONTRACT for the personal services of musicians, made this 10th day of NOVEMBER, 1942

between the undersigned employer (hereinafter called the employer) and [illegible] musicians (hereinafter called employees) represented by the undersigned representative. (including Leader)

WITNESSETH, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of O. [illegible] WILLIAMS, according to the following terms and conditions:

Place of employment [illegible], ILLINOIS

Date(s) of employment [illegible] approximately March 25 or April 1, 1943, and [illegible], subject to four weeks' notice.

Hours of employment [illegible] 9:30 PM to 1:30 AM nightly and Sunday 7:30 PM to 2:30 AM Saturday NO MONDAYS. It is also understood and agreed that if Thanksgiving comes within the [illegible] Dance Session will be played at scale.

Price agreed upon $2000.00 per week (Terms and amount)

To be paid [illegible] (Specify when payments are to be made)

The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. The employer agrees that the Business Representative of the Musicians' Local, in whose jurisdiction the musicians are playing, shall have access to the premises in which the musicians perform (except in private residences) for the purpose of conferring with the musicians. The musicians performing services under this contract must be members of the American Federation of Musicians and nothing in this contract shall ever be so construed as to interfere with any obligation which they may owe to the American Federation of Musicians.

It is agreed that all the rules, laws and regulations of the American Federation of Musicians, and all the rules, laws and regulations of the Local in whose jurisdiction the musicians perform, insofar as they are not in conflict with those of the Federation, are made part of this contract.

The employer represents that there does not exist against him, in favor of any employee-member of the American Federation of Musicians, any claim of any kind arising out of musical services rendered for any such employer. It is agreed that no employee-member of the American Federation of Musicians will be required to perform any provisions of this contract or to render any services for said employer as long as any such claims is unsatisfied or unpaid, in whole or in part. The employer in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein.

Plaintiff's Exhibit B-44, U. S. District Court, December 12, 1944

[fol. 860] Mr. Roberts: It is hereby stipulated by counsel for the respective parties in this case that the plaintiffs in the Bartels case paid as the contract price in the case of the engagements of the hereinafter named orchestras the amounts as follows:

Paul Carlson and His Orchestra	$250.00
Tiny Hill and His Orchestra	$250.00
Boyd Raeburn and His Orchestra	$175.00
Buddy Fisher and His Orchestra	$100.00.

Is that agreed to?

Mr. Cohen: Yes. We will agree to that.

Mr. Padway: Is it conceded that the leaders and sidemen of all the orchestra identified in this action were members in good standing of the American Federation of Musicians?

Mr. Charlton: If it is a fact?

Mr. Padway: It is a fact.

The Court: With reference to the three motions made by the plaintiffs to strike at the close of the testimony of the witness Hild, as I suggested, so far as I am advised at the present time, I would say that motions 1, 2 and 3 should be sustained insofar as they were expressions of opinion by the witness as to the effect of actions that were taken and insofar as he may have testified as to the contents of contracts [fol. 861] or any writings or letters, to which there was an objection at the time, but as all the evidence went in under objections they were offered subject to the objection, and I think there is nothing new in these motions that should be considered by the court aside from those objections, and it will be permitted to stand subject to the objections with the assurance to counsel that this court is not going to be carried away by incompetent and irrelevant testimony, but the evidence was taken in the record and I think it should stand. (All parties except.)

Mr. Charlton: The plaintiffs rest.

Mr. Cohen: The Government rests.

Mr. Padway: We rest.

(Recess 3:05 p. m. to 3:20 p. m.)

* * * * * *

[fol. 864] (Opinion, Findings of Fact and Conclusions of Law of District Court.)

Filed in U. S. District Court January 5, 1945.

United States District Court, Southern District of Iowa, Central Division.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, doing business as Crystal Ballroom, Plaintiffs,
No. 294 vs. Civil Action
E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant.

Griff Williams, et al., Interveners.

Larry V. Geer and Margaret Geer, doing business as Larry Geer Ballrooms, Plaintiffs,
No. 328 vs. Civil Action
E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant.

The above entitled actions came on for hearing on their merits on December 11, 1944, at Des Moines. Evidence was introduced, arguments had and the cases submitted on their merits, with additional written briefs.

The two actions were consolidated for trial and one opinion and one findings of fact will be applicable to each case.

The actions were brought by certain operators of ballrooms in Iowa against the Collector of Internal Revenue to recover taxes paid to him under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act upon a claim by the Commissioner of Internal Revenue that such operators were the employers of certain orchestra leaders and their "sidemen" (members of the orchestras) on the dates of their respective engagements.

[fol. 865] Such orchestras and their leaders and the dates of their respective engagements for the plaintiffs in Civil Action No. 294 are as follows:

Griff Williams and his orchestra	Sept. 1, 1941.
Bill Carlson and his orchestra	Aug. 17, 1941.
Tiny Hill and his orchestra	Sept. 28, 1941.
Boyd Raeburn and his orchestra	Oct. 5, 1941.
Buddy Fisher and his orchestra	Nov. 23, 1941.
Paul Moorhead and his orchestra	Jan. 18, 1942.

Such orchestras and their leaders and the dates of their respective engagements for the plaintiffs in Civil Action No. 328 are as follows:

Al Menke and his orchestra	Oct. 12, 18, 1941. Nov. 8, 26, 1941. Nov. 26, 1942.
Les Hartman and his orchestra	Feb. 5, March 5, Apr. 2, May 7, June 4, July 2, Aug. 6, Sept. 3 & Oct. 1, 1942.
Jimmy Barnett and his orchestra	Jan. 1, 5, 24, Apr. 25, June 16, July 2, 3, 4, Aug. 1, 8, Sept. 12, Oct. 4, Nov. 7, 14, 15, 17, Dec. 5, 6, 22, all in 1942.
Paul Moorhead and his orchestra	Feb. 17, 22, March 21, 22, Apr. 18, May 2, 9, 16, 28 & 31, June 2, 30, July 11, 12, 14, 16, Oct. 10, 11, 12, 24, all in 1942.
Blue Barron and his orchestra	Aug. 26, 1941, & July 4, 5 and 9, 1942.
Doc Lawson and his orchestra	July 4, 1942.

In Civil Action No. 294 the leaders of the orchestras have intervened and filed answers designating themselves as defendants.

Plaintiffs claim that they were not the employers of the leaders and the sidemen within the meaning of the taxing statutes but that each leader was an independent contractor and the sidemen were solely his employees.

[fol. 866] It is established by the taxing statutes, the common law and the regulations of the Commissioner of Internal Revenue that in order to constitute an employment within the meaning of the taxing acts the legal relationship of employer-employee must exist between the person for whom the services are performed and the individual who performed them and that an independent contractor and his men are not such employees.

Secs. 1001, et seq., Title 42, U.S.C.; Secs. 1400, 1410, 1600, 1607, Title 26, U.S.C., Internal Revenue Code.

Sec. 402.204, Internal Revenue Regulation 106.

Texas Company vs. Higgins, 118 F.2d 636.

Indian Refining Co. vs. Dallman, 119 F.2d 417.

Williams vs. United States, 126 F.2d 129.

[illegible] Collector, vs. Empire Star Mines, 129 F.2d 914.

[illegible]ty Music Hall Corpn. vs. U.S., 135 F.2d 715.

[illegible]l Co. vs. Fly, 135 F.2d 491.

Fahs vs. Orange State Oil Co., 138 F.2d 743.

Glenn vs. Beard, 141 F.2d 376.

U.S. vs. Mutual Trucking Co., 141 F.2d 655.

Jones vs. Goodson, 121 F.2d 176.

In the last cited case, 121 F.2d 176, a definition of what constitutes an independent contractor is set forth, p. 179, as follows:

"Little difficulty has been encountered in defining in the abstract the relationship of master and servant and that of an independent contractor, and in drawing the line of distinction between the two. The relationship of master

and servant exists where the employer has the right to direct and control the method and manner in which the work shall be done and the result to be accomplished, while an independent contractor is one who engages to perform service for another according to his own method and manner, free from direction and control of the employer in all matters relating to the performance of the work, except as to the result or the product. The line of separation between the two is the degree of direction and control. In the former, direction and control over both method and manner of doing the work and the result produced; in the latter, direction and control are limited to the result and do not apply to the method and manner of the service rendered."

Orchestras of this type known as "name orchestras" or "name bands", originate by some individual who believes that he can create an organization which will be employed for entertainment purposes by dancehall operators, hotels, radio programs and public and private parties.

The leader is highly individualistic, featuring his own name as leader, and his success or failure to a great extent depends upon his musical ability, power to create an out-[fol. 867] standing, or at least, a distinctive or specialized style and method of rendering music and his showmanship. He uses every adroit means of advertising available to him and to please his customers. Organization and success mean an expenditure of sums of money for music and accessories, salaries or promise of rewards during the formation of the orchestra, for rehearsals, and the musicians must be suitably and distinctively dressed.

Appearances are usually for one night but there may be repeats. The business is highly competitive. Many fall by the wayside, others attain phenomenal success. Success or failure depends to a great extent upon the leader, although the ability of the individual members should not be decried. The orchestras here in controversy are primarily dance orchestras. When an orchestra has been built up so that a demand is created for its services, the leaders generally employ booking agents to secure appearances in ballrooms or other places seeking their particular form of entertainment.

The evidence establishes that the leaders at all times exercised the entire direction and control over their orchestras and the method and manner of doing the work. They, of course, exercised the right to engage such members of the orchestra and to dispense with their services as they saw fit, to arrange for and pay their wages, to keep all profits and sustain and pay such losses as might occur, pay transportation and incidental expenses and direct and control the orchestra during engagements. None of the musical instruments are furnished by the customer, except the piano, which is part of the equipment of the establishment in which they perform. The leader created and established and had for sale an independent business and the ballroom operator was interested only in the result of the performance.

This situation creates and shows that the orchestra leaders were independent contractors and at the time of their engagements the members of the orchestras were employees of such independent contractors.

[fol. 868] Griff Williams vs. United States, 126 F.2d 129, (certiorari denied, Oct. 12, 1942).

Aberdeen Aerie No. 24 vs. United States, 50 F. Supp. 734.

In re Ten Eyck Co., Inc., 41 F. Supp. 375.

Longo vs. Glenn, by U.S.D.C. for W. D. Ky. Nov. 20, 1943, (CCH, Fed. Unemployment Ins. Service, par. 9088).

Biltgen vs. Reynolds, by U.S.D.C. for Minn., 1943, (CCH, Fed. Unemployment Ins. Service, par. 9046).

Spillson vs. Smith, by U.S.D.C. for N. D. Ind., Feb. 15, 1944, (CCH, Fed. Unemployment Ins. Service, par. 9111).

Los Angeles Athletic Club vs. U.S., by U.S.D.C. for S. D. Calif., Feb. 25, 1944, (CCH, Fed. Unemployment Ins. Service, par. 9104).

The Commissioner of Internal Revenue evidently would accept this conclusion were it not for a contract between the parties, known in the record as "Form B", as he has refunded to the plaintiffs in Civil Action No. 294 all such taxes collected where the contract Form B was not used.

This Form B contract has a history. Sometime ago the American Federation of Musicians had prepared and required all orchestra leaders and their booking agents to use when arranging for engagements a contract providing in general terms that the owners of the establishments or persons engaging their services were employers and the musicians of the orchestras their employees. A trial court found that this position was correct but on appeal it was held that this contract did not change the relationship from that of an independent contractor to that of employer and employee. See Griff Williams vs. United States, 126 F.2d 129. The finding by the court that under such a contract the orchestra leader was still an independent contractor was accepted by the Commissioner as indicated by the refund above referred to.

While this litigation was in progress the American Federation of Musicians had prepared and sent to each local of the musicians' union a suggested contract known as Form B, together with a letter from the President of that union stating that it must be used for all engagements after June 1, 1941, and that it had been adopted by the international executive board "for the purpose of protecting our members under the Social Security Laws."

[fol. 869] Since that time Form B has been used and was so used in each of the engagements here under consideration. It provides, as did the other preceding contracts, that the owners of the amusement establishment were the employers of the leaders and the individual members of the orchestras, but added the provision that it was an employment by the owner for the personal services of the employees as musicians severally, and that—

"The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract."

The contract also gave the name of the leader, name and address of the place of engagement, the time, the hours to be worked, and the price agreed upon (which was substantial) and when it was to be paid.

It is the contention of the Government and the intervenors that these contracts (Form B) are conclusive of an employer-employee relationship. I cannot agree. It may

be an element that may be considered by the fact finder if of any assistance in determining what is the true relationship.

The leading case on the subject of the conclusive effect of such contracts is perhaps Griffiths vs. Commissioner, 308 U.S. 355, 358, wherein that court said:

"Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed .... Taxes cannot be escaped 'by anticipatory arrangements and contracts however skilfully devised.....'"

And in Moline Properties vs. Commissioner, 319 U.S., 436, 439, it is said:

"In general, in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal."

And there are authorities holding that, in tax matters, the courts are not interested in the terminology of the contract but that they look to the true situation to see whether there is in fact an employer-employee relationship or the relationship of an independent contractor.

[fol. 870] Willard Sugar Co. vs. Gentsch, by the U.S.D.C. for N.D.O., March 3, 1944, (CCH Unemployment Ins. Service, par. 9106).

Mateovitch vs. Anglin, 134 F.2d 834.

McDermott vs. Hendrickson, 45 F. Supp. 277.

And the same rule applies in numerous workmen compensation and tort cases.

Gulf Refining Co. vs. Brown, 93 F.2d 870.

In re Horton, 284 N.Y. 167.

Industrial Com. vs. N. W. Mutual Life Ins. Co., 103 Col. 550, 88 Pac. 2d 560.

Jack & Jill, Inc., vs. Tone, 126 Conn. 114, 9 At. 2d 497.

Sanford vs. Goodbridge, 13 N.W. 2d 486 ..., Ia. ....

Glielmi vs. Netherland Dairy Co., 254 N.Y. 62, 171 NE 907.

Nestle's Food Co. vs. Industrial Com., 205 Wis. 467, 237 N.W. 117.

Brown vs. Industrial Ac. Com. of Calif., 174 Cal. 457, 163 Pac. 664.

And the Commissioner of Internal Revenue has by regulation long recognized this rule of the common law.

Sec. 402.204 of the Regulation 106.

I am satisfied that what is the true relationship is a fact question and in considering and determining the question of the true relationship of the parties here the court should take into consideration the fact that the contract was not entered into by fair negotiations between the parties, but upon demand of the musicians' union and the requirement that it must be signed or no orchestra could be obtained; that it was required to be executed with the avowed purpose and intent of protecting the leader from taxes as an employer.

And the contract should also be appraised in connection with the circumstances that both preceded and followed its execution. Butler Bros vs. N.L.R.B., 134 F.2d 981, 985.

It is apparent from the evidence that there was no difference in the conduct and control of the orchestra by the leader after June 1941. The intervenor Mr. Paul Moorhead was asked if he would terminate the services of one of the members of his orchestra at the request of the ballroom owner, and, after hesitating, said that he would ask the member to step down from the rostrum.

[fol. 871] Even if this hypothetical situation had occurred, and the evidence does not disclose that it ever did, still it would be no more than Mr. Moorhead would have done before the Form B contract was introduced, as he was desirous of pleasing the person employing his services and would go to any extent to defer to any wish of the owner so long as it did not interfere with his actual control over the orchestra. The matters testified to by Mr. Moorhead were inconsequential as to the real question in issue.

The difficulty which appears to bother the Commissioner is the provision of the contract giving to the owner the right of control. It seems to be his thought that as this right of

control was given to the ballroom operator by the contract the fact that such control was not exercised by him but continued to be exercised by the leader of the orchestra could not change his right of control which determines the relationship of employer and employee. In other words, he is apparently not able to perceive how this right could be taken away or proven not to exist even though it was not exercised.

But why, in determining the true relationship, disregard parts of the written contract and not others? One answer is that under the situation here shown such right could not be exercised. If the owner attempted to exercise any such right of taking charge and control of the orchestra it would destroy the orchestra and the result of a satisfactory entertainment. It just could not be done. The leader in each instance controlled the details and the manner of the performance of the members of the orchestra, and the evidence of actual control is sufficient to warrant a finding of the right of actual control.

The purpose of a contract is to express the intention of the parties regarding the subject matter. As between the parties the agreement is generally conclusive as to such intent, but as against a third person the true intent may be shown. It gets us back to the pronouncement of the Supreme Court above referred to in 308 U. S. 355, 358, that—

[fol. 872] "Taxes cannot be escaped 'by anticipatory arrangements and contracts however skilfully devised . . .' "

I therefore make the following findings of fact and conclusions of law.

Findings of Fact.

1. That at all times, and during the times of the performance by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work. Such leader exercised and had the exclusive right to hire and fire such members, to contract for and pay their wages, and to keep all profits and sustain and pay such losses as occurred from the performances. Such leader organized, managed and controlled such orches-

tras as an independent organization for hire, and the true relationship as shown by the evidence was that such leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue statutes.

2. The contract, Form B, was not entered into by fair negotiation between the parties; but upon demand of the musicians' union and the leaders of the orchestras that it must be entered into or no orchestra could be obtained, and it was required to be so executed with the avowed purpose of protecting the leader from taxes as an employer. It was required by the leader to be entered into as an anticipatory arrangement to escape taxation.

There was no difference in the conduct and control of the orchestras, or the right to so conduct and control such orchestras, subsequent to June 1941, or by reason of the Form B contract, than there was before that time, and the true relationship at all times as between the plaintiffs and such leaders was that the latter were independent contractors.

[fol. 873] 3. At the time of the execution of the contracts, Form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen; or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestra or any of the sidemen, or the method or manner of doing its or their work in any particular.

4. Considering all the facts and circumstances as disclosed by the evidence, including the contract Form B and its execution, none of the plaintiffs was at the time of the performances of the several orchestras on their premises the employer of the leader or of any of the members of the orchestras within the meaning of the Internal Revenue statutes.

Conclusions of Law.

1. The court has jurisdiction of the subject matter and of the parties.

2. That at the time of the engagements of the orchestras with the ballroom operators, plaintiffs in these cases, the leader and the members of such orchestras were not the employees of the plaintiffs, within the meaning of the Internal Revenue acts.

3. That at the time of the engagements of the orchestras with the ballroom operators, plaintiffs in these cases, the leader of such orchestra was an independent contractor and the members of his orchestra were his employees.

4. That the conclusions arrived at by the court herein make it unnecessary to decide other questions raised by the plaintiffs.

5. Plaintiffs are entitled to the relief demanded and for judgment of the amount of the taxes paid with interest.

6. That all of the costs should be taxed against the defendant and the intervenors, except the costs that were exclusively made in Cause No. 328 and such costs should be taxed against the defendant in that case.

[fol. 874] The attorneys for the plaintiffs may prepare a judgment entry in each case, setting forth the amount of the judgment and costs, and submit it to the attorneys for the Government in conformity with the local rules of this court.

In each case defendants and interveners except to each findings of fact and conclusions of law.

Signed at Des Moines, Iowa, this 5th day of January, 1945.

CHAS. A. DEWEY,
United States District Judge.

[fol. 875] (Judgment in Case No. 294 Civil Action.)

Filed in U. S. District Court January 20, 1945.

United States District Court, Southern District Of Iowa, Central Division.

Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, d/b/a Crystal Ballroom, Plaintiffs,
Civil Action. vs. No. 294.
E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant.
Griff Williams, et al., Interveners.

This cause having come on for trial before the Court on December 11, 1944, and the evidence adduced by the parties

having been heard, and the court having made its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged And Decreed, That Plaintiffs recover of the Defendant the sum of $20.98, with interest at the rate of 6% per annum from the 5th day of May, 1943, and that Plaintiffs recover of the Defendant and the Intervenors their costs expended herein in the amount of $271.69. Defendants and Intervenors except.

Dated January 20th, 1945.

Enter:

CHAS. A. DEWEY,
Judge.

Approved as to form.

CLOID I. LEVEL,
Asst. U. S. Attorney.

Judgment entered in Civil Order Book 3, Page 287 and entered in Civil Docket No. 3, Page 44.

[fol. 876] (Judgment in Case No. 328 Civil Action.)

Filed in U. S. District Court January 20, 1945.

This cause having come on for trial before the Court on December 11, 1944, and the evidence adduced by the parties having been heard, and the court having made its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged And Decreed, That Plaintiffs recover of the Defendant the sum of $401.08, with interest at the rate of 6% per annum from the 4th day of August, 1943, and that Plaintiffs recover of the Defendant their costs expended herein in the amount of $46.96.

Defendants except.

Dated January 20th, 1945.

Enter:

CHAS. A. DEWEY,
Judge.

Approved as to form.

CLOID I. LEVEL,
Asst. U. S. Atty.

Judgment entered in Civil Order Book 3, Page 288 and in Civil Docket No. 3, Page 78.

[fol. 877] Notice Of Appeal By E. H. Birmingham, Individually And As Collector Of Internal Revenue For The State Of Iowa.

Filed in U. S. District Court April 14, 1945.

Notice is hereby given this 14th day of April, 1945, that E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment of this Court entered on the 20th day of January, 1945, in favor of Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, d/b/a Crystal Ballroom, plaintiffs, and against E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, and ordering, judging and decreeing that plaintiffs recover of the defendant, E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, the sum of $20.98 and interest thereon and also for costs.

MAURICE F. DONEGAN,
United States Attorney

CLOID I. LEVEL,
Assistant U. S. Attorney

HAROLD D. COHEN,
Special Assistant to the Attorney General

Attorneys for Defendant.

Des Moines, Iowa, April 14, 1945.

Copies mailed to Chauncey A. Weaver and Joseph A. Padway, Attys. for Interveners, and to Thomas B. Roberts and Clyde B. Charlton, Attorneys for Plaintiffs, at Des Moines, Iowa, April 14, 1945.

N. F. REED,
Clerk, U. S. District Court,
By Justine Hummel,
Deputy.

[fol. 878] Notice Of Appeal By Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher And Paul Moorhead, Intervenors.

Filed in U. S. District Court April 13, 1945.

Notice is hereby given this 13 day of April, 1945 that Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, intervenors, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Judgment of this court entered on the 20th day of January, 1945, in favor of Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlan, d/b/a Crystal Ballroom, plaintiffs, and against E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, and ordering, judging and decreeing that plaintiffs recover of the defendant and the said intervenors the cost expended.

CHAUNCEY A. WEAVER,
325 Insurance Exchange
Des Moines, Iowa.

JOSEPH A. PADWAY

ROBERT A. WILSON
736 Bowen Building
Washington 5, D. C.

Attorneys for Intervenors.

Des Moines, Iowa, April 13, 1945.

Copy of Notice of Appeal mailed to Thomas B. Roberts and Clyde B. Charlton, Des Moines, Iowa, attorneys for plaintiff, and to the United States Attorney, Des Moines, Iowa, attorney for the defendant, April 13, 1945.

N. F. REED,
Clerk, U. S. District Court
By Gertrude Darrell,
Deputy.

[fol. 879] (Notice of Appeal by E. H. Birmingham, Individually and as Collector of Internal Revenue for State of Iowa, in Case No. 328 Civil Action.)

(Filed in U. S. District Court April 14, 1945.)

Notice is hereby given this 14th day of April, 1945, that E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment of this Court entered on the 20th day of January, 1945, in favor of Larry V. Geer and Margaret Geer, d/b/a Geer Ballrooms, plaintiffs, and against E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, defendant, and ordering, judging and decreeing that plaintiffs recover of the defendant, E. H. Birmingham, individually and as Collector of Internal Revenue for the State of Iowa, the sum of $401.08 and interest thereon and also for costs.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant U. S. Attorney.

HAROLD D. COHEN,
Special Assistant to the Attorney General.

Attorneys for Defendant.

Des Moines, Iowa. April 14, 1945.

Copy mailed to Thomas B. Roberts, and Clyde B. Charlton, Attorneys for Plaintiff, at Des Moines, Iowa, April 14, 1945.

N. F. REED,
Clerk, U. S. District Court.
By Justine Hummel,
Deputy.

[fol. 884] (Designation of Defendant of Matters to be Contained in Transcript on Appeal in Case No. 294 Civil Action.)

Filed in U. S. District Court, July 3, 1945.

To the Clerk of the District Court of the United States for the Southern District of Iowa, Central Division:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the Appeal of the said United States Circuit Court of Appeals for the Eighth Circuit heretofore filed by the defendant:

1. The Complaint filed January 3, 1944.

2. The Amendment to the Complaint filed March 22, 1944.

3. Answer of defendant E. H. Birmingham, individually and as Collector for the State of Iowa, filed March 31, 1944.

4. Respective Motions of Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to intervene in this action.

5. The respective Orders of the Court granting leave to Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to intervene in this action.

[fol. 885] 6. The respective Answers of Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to the Complaint and amended Complaint.

7. The complete transcript of the testimony and all Stipulations stipulated and all orders dictated into the Record and all Exhibits submitted at the trial before Judge Dewey, excepting Exhibits 8, B-2, B-3, B-4 and B-5.

8. The complete Transcript of the Deposition of intervener Griff Williams.

9. The complete Transcript of the Deposition of James K. Breyley and Joseph L. Kayser.

10. The Memorandum Opinion with Findings of Fact and Conclusions of Law.

11. The Judgment of January 20, 1945 against defendant and Interveners.

12. The Joint Notice of Appeal of Interveners.

13. The Notice of Appeal of Defendant Birmingham, with date of filing, to-wit, April 14, 1945.

14. Orders extending the time for filing Record on Appeal and docketing the same.

15. This Designation of the Record.

16. Clerk's Certificate.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant U. S. Attorney.

WM. R. SHERIDAN,
Assistant U. S. Attorney.

HAROLD D. COHEN,
Special Assistant to the Attorney General.

Attorneys for Defendant,
202 U. S. Court House,
Des Moines, Iowa.

Service of a copy of this designation of contents of record on appeal acknowledged this 3rd day of July, 1945.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
Attorneys for Plaintiff-Appellee.

JAS. R. PADWAY,
CHAUNCEY A. WEAVER,
Attorneys for Defendants-Interveners.

Dated this 3rd day of July, 1945.

[fol. 886] (Designation of Defendant of Matters to be Contained in Transcript on Appeal in Case No. 328 Civil Action.)

Filed in U. S. District Court, July 3, 1945.

To the Clerk of the District Court of the United States for the Southern District of Iowa, Central Division:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the Appeal to the said United States Circuit Court of Appeals for the Eighth Circuit heretofore filed by the Defendant:

1. The Complaint filed July 20, 1944.

2. Answer of Defendant E. H. Birmingham, Individually and as Collector for the State of Iowa, filed August 29, 1944.

3. The complete transcript of the testimony and all Stipulations stipulated and all orders dictated into the Record and all Exhibits submitted at the trial before Judge Dewey, excepting Exhibits 8, B-2, B-3, B-4, and B-5.

4. The Memorandum Opinion with Findings of Fact and Conclusions of Law.

5. The Judgment of January 20, 1945, against Defendant, and Interveners.

6. The Notice of Appeal of Defendant Birmingham, with date of filing, to-wit, April 14, 1945.

[fol. 887] 7. Orders extending the time for filing Record on Appeal and docketing the same.

8. This Designation of the Record.

9. Clerk's Certificate.

MAURICE F. DONEGAN,
United States Attorney.

CLOID I. LEVEL,
Assistant U. S. Attorney.

WM. R. SHERIDAN,
Assistant U. S. Attorney.

HAROLD D. COHEN,
Special Assistant to the Attorney General.

Attorneys for Defendant,
202 U. S. Court House,
Des Moines, Iowa.

Service of a copy of this designation of contents of record on appeal acknowledged this 3rd day of July, 1945.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,

Attorneys for Plaintiff-Appellee.

Dated this 3rd day of July, 1945.

[fol. 888] (Designation of Interveners of Matters to be Contained in Transcript on Appeal in Case No. 294 Civil Action.)

Filed in U. S. District Court, July 3, 1945.

Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill, Interveners Appellants, designate the following as the record on appeal herein:

1. The Complaint.

2. The Amended Complaint.

3. The Answer of Defendant Birmingham.

4. The respective Motions of Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to intervene in this action.

5. The respective Orders of the Court granting leave to Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to intervene in this action.

6. The respective Answers of Griff Williams, Paul Moorhead, Buddy Fisher, Bill Carlsen, Boyd Raeburn and Tiny Hill to the Complaint and Amended Complaint.

[fol. 889] 7. The complete Transcript of the Testimony and all Exhibits submitted at the Trial before Judge Dewey.

8. The complete Transcript of the Deposition of Intervener Griff Williams.

9. The complete Transcript of the Depositions of James K. Breyley and Joseph L. Kayser.

10. The Memorandum Opinion with Findings of Fact and Conclusions of Law of Judge Dewey.

11. The Judgment of January 20, 1945 against Defendant and Interveners.

12. The Joint Notice of Appeal of Interveners.

13. The Notice of Appeal of Defendant Birmingham.

14. This Designation of Record.

15. Clerk's Certificate.

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines 9, Iowa.

JOSEPH A. PADWAY,

ROBERT A. WILSON,
736 Bowen Building,
Washington 5, D. C.

Attorneys for Interveners.

MAURICE F. DONEGAN,
CLOID I. LEVEL,
WM. R. SHERIDAN,
HAROLD D. COHEN,
Attorneys for Defendant.

Dated this 3rd day of July, 1945.

Service of a copy of this designation of contents of record on appeal acknowledged this 3rd day of July, 1945.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
Attorneys for Plaintiff-Appellee.

[fol. 890] Clerk's Certificate to Transcript.

United States of America,
Southern District of Iowa.—ss.:

I, N. F. Reed, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing 890 pages to contain a full, true and complete transcript of the record in No. 294-Civil Action, Central Division, Roy Bartels, et al., Plaintiffs, vs. E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant, and in No. 328-Civil Action, Central Division, Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, Plaintiffs, vs. E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Defendant, as called for in the Designations of the Record on Appeal filed July 2, 1945, as full, true and complete as the originals thereof on file and of record in office in the City of Des Moines, in said District.

Seal
U. S. Dist. Court
Southern Dist. of
Iowa

In Witness Whereof, I hereunto set my hand and affix the seal of said Court at office in the City of Des Moines, in said District, this 5th day of July, A. D., 1945.

N. F. REED,
Clerk, U. S. District Court,
Southern District of Iowa.

Nos. 13124-25. Filed Jul. 7, 1945. E. E. Koch, Clerk.

No. 13127. Filed Jul. 10, 1945. E. E. Koch, Clerk.

[fol. 891] (Order Consolidating Cases for Hearing, for Printing of Single Record and Single Briefs, etc.)

United States Circuit Court of Appeals,
Eighth Circuit.

May Term, 1945.

Monday, August 27, 1945.

E. H. Birmingham, Individually, and as Collector, etc.,
Appellant,
No. 13124. vs.
Roy Bartels, et al.

Appeal from the District Court of the United States for the Southern District of Iowa.

E. H. Birmingham, Individually, and as Collector, etc., Appellant,
No. 13125. vs.
Larry V. Geer, et al.

Appeal from the District Court of the United States for the Southern District of Iowa.

and

Griff Williams, et al., Appellants,
No. 13127. vs.
Roy Bartels, et al.

Appeal from the District Court of the United States for the Southern District of Iowa.

In these causes counsel for the respective parties have filed a joint motion for consolidation of the appeals so that one printed record will suffice and also one brief for the respective parties, and a stipulation has also been filed that the time for the filing of the printed record and the briefs of the Collector and Interveners may be extended to and including September 20, 1945, and in pursuance thereof,

These causes are by the Court therefore consolidated for the hearing of the appeals in this Court, for the printing of a single record in the three cases, and filing of a single brief for each of the respective parties in the three cases. The stipulation is approved by the Court, and the time extended for the filing of the printed record and filing of the briefs of the Collector and Interveners to and including September 20, 1945.

August 27, 1945.

[fol. 892] (Designation and Stipulation for omission of parts of record and exhibits in printing.)

On October 4, 1945, a Designation for omissions in printing record and a Stipulation for printing of only parts of certain exhibits were filed in the United States Circuit Court of Appeals and the printed record in these cases has been prepared pursuant to such Designation and Stipulation.

[fol. 676] And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Mr. Samuel O. Clark, Jr., and Mr. Sewall Key as Counsel for Appellant in Cause No. 13,124.)

United States Circuit Court of Appeals

Eighth Circuit

E. H. Birmingham, Individually and as Collector of Internal Revenue, Appellant,
No. 13,124. vs.
Roy Bartels, et al., d/b/a Crystal Ballroom.

The Clerk will enter our appearance as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 7, 1945.

(Appearance of Mr. A. F. Prescott and Mr. Harold D. Cohen as Counsel for Appellant in Cause No. 13,124.)

The Clerk will enter our appearances as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
HAROLD D. COHEN,
Special Assistants to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 29, 1945.

[fol. 677] (Appearance of Mr. Lyle M. Turner as Counsel for Appellant in Cause No. 13,124.)

The Clerk will enter my appearance as Counsel for the Appellant.

LYLE M. TURNER,
Special Asst. to the Attorney General,
Washington, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

(Appearance of Mr. Clyde B. Charlton and Mr. Thomas B. Roberts as Counsel for Appellees in Cause No. 13,124.)

The Clerk will enter my appearance as Counsel for the Appellees.

CLYDE B. CHARLTON,
THOMAS B. ROBERTS.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 6, 1945.

(Appearance of Mr. Gordon Diesing as Counsel for Amicus Curiae, Nebraska National Hotel Company, in Cause No. 13,124.)

The Clerk will enter my appearance as Counsel for the applicant as Amicus Curiae.

GORDON DIESING,
Attorney,
1530 City Natl. Bank,
Omaha, Nebr.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

[fol. 678] (Appearance of Mr. Samuel O. Clark, Jr., and Mr. Sewall Key as Counsel for Appellant in Cause No. 13,125.)

United States Circuit Court of Appeals

Eighth Circuit

E. H. Birmingham, Individually and as Collector of Internal Revenue, Appellant,

No. 13,125. vs.

Larry V. Geer and Margaret Geer d/b/a Larry Geer Ballrooms.

The Clerk will enter our appearances as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 7, 1945.

(Appearance of Mr. A. F. Prescott and Mr. Harold D. Cohen as Counsel for Appellant in Cause No. 13,125.)

The Clerk will enter our appearances as Counsel for the Appellant.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
HAROLD D. COHEN,
Special Assistants to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 29, 1945.

[fol. 679] (Appearance of Mr. Lyle M. Turner as Counsel for Appellant in Cause No. 13,125.)

The Clerk will enter my appearance as Counsel for the Appellant.

LYLE M. TURNER,
Special Asst. to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

(Appearance of Mr. Clyde B. Charlton and Mr. Thomas B. Roberts as Counsel for Appellees in Cause No. 13,125.)

The Clerk will enter my appearance as Counsel for the Appellees.

CLYDE B. CHARLTON,
THOMAS B. ROBERTS.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sep. 6, 1945.

(Appearance of Mr. Gordon Diesing as Counsel for Amicus Curiae, Nebraska National Hotel Company, in Cause No. 13,125.)

The Clerk will enter my appearance as Counsel for the Amicus Curiae, Nebraska National Hotel Company.

GORDON DIESING.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

[fol. 680] (Appearance of Mr. Chauncey A. Weaver as Counsel for Appellant in Cause No. 13,127.)

United States Circuit Court of Appeals
Eighth Circuit

Griff Williams, et al., Appellants,
No. 13,127. vs.
Roy Bartels, et al.

The Clerk will enter my appearance as Counsel for the Appellants.

CHAUNCEY A. WEAVER,
325 Insurance Exchange,
Des Moines, Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 10, 1945.

(Appearance of Mr. Joseph A. Padway as Counsel for Appellants in Cause No. 13,127.)

The Clerk will enter my appearance as Counsel for the Appellants.

JOSEPH A. PADWAY,
736 Bowen Bldg.,
Washington 5, D. C.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 14, 1945.

[fol. 681] (Appearance of Mr. Thomas B. Roberts and Mr. Clyde B. Charlton as Counsel for Appellees in Cause No. 13,127.)

The Clerk will enter my appearance as Counsel for the Appellees.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
40th Floor,
Empire Bldg.,
Des Moines, Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jul. 18, 1945.

(Appearance of Mr. Gordon Diesing as Counsel for Amicus Curiae, Nebraska National Hotel Company, in Cause No. 13,127.)

The Clerk will enter my appearance as Counsel for the Amicus Curiae, Nebraska National Hotel Company.

GORDON DIESING.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 7, 1946.

[fol. 682] (Order of Submission in Causes Nos. 13,124, 13,125 and 13,127.)

United States Circuit Court of Appeals

Eighth Circuit

January Term, 1946.

Monday, January 7, 1946.

E. H. Birmingham, Individually and as Collector of Internear Revenue for the State of Iowa, Appellant,
No. 13,124. vs.
Roy Bartels, et al., d/b/a Crystal Ballroom.

Appeal from the District Court of the United States for the Southern District of Iowa.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,
No. 13,125. vs.
Larry V. Geer, et al., d/b/a Larry Geer Ballrooms.

Appeal from the District Court of the United States for the Southern District of Iowa.

and

Griff Williams, et al., Interveners, Appellants,
No. 13,127. vs.
Roy Bartels, et al., d/b/a Crystal Ballroom.

Appeal from the District Court of the United States for the Southern District of Iowa.

These causes having been called for hearing in their regular order, application of Nebraska National Hotel Com-
[fol. 683] pany for leave to file brief as Amicus Curiae is presented by Mr. Gordon Diesing and granted by the Court, there being no objection by counsel.

Arguments on the merits was commenced by Mr. Lyle M. Turner, Special Assistant to The Attorney General, for E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, continued by Mr. Thomas B. Roberts and Mr. Clyde B. Charlton for appellees Roy Bartels, et al., and Larry V. Geer, et al., and concluded by Mr. Gordon Diesing for Amicus Curiae.

Thereupon, these causes were submitted to the Court on the transcript of the records from the said District Court and the briefs of counsel for the respective parties.

[fol. 684] (Opinion.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 13,124.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,

vs.

Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, Appellees.

No. 13,125.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,

vs.

Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, Appellees.

No. 13,127.

Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, Interveners, Appellants,

vs.

Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, Appellees.

Appeals from the District Court of the United States for the Southern District of Iowa.

September 25, 1946.

Mr. Lyle M. Turner, Special Assistant to the Attorney General, (Mr. Samuel O. Clark, Jr., Assistant Attorney General, Mr. Sewall Key, Mr. A. F. Prescott, Mr. Harold D. Cohen, Special Assistants to the Attorney General, Mr. Maurice F. Donegan, United States Attorney, and Mr. Cloid I. Level, Assistant United States Attorney, with him on the brief) for E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellants.

Mr. Joseph A. Padway, Mr. Robert A. Wilson and Mr. Chauncey A. Weaver submitted brief for Griff Williams, et al., Interveners, Appellants.

Mr. Thomas B. Roberts and Mr. Clyde B. Charlton for Roy Bartels, et al., and Larry V. Geer, et al., Appellees.

Mr. Gordon Diesing (Mr. William J. Hotz, Mr. William F. Dalton, and Messrs. Hotz & Hotz with him on the brief) for Amicus Curiae, Nebraska National Hotel Company.

Before GARDNER, WOODROUGH and JOHNSEN, Circuit Judges.

JOHNSEN, Circuit Judge, delivered the opinion of the Court.

These are appeals by a Collector of Internal Revenue from judgments of a District Court in favor of two ballroom operators[1] for refunds of social security taxes (retirement and unemployment), 26 U.S.C.A. Int. Rev. Code, §§ 1400,[2] 1410, 1600, collected from the operators on the leaders and members of a number of traveling orchestras, which had furnished the music, mostly on single-night en-

[1]One of the ballrooms was located at Dubuque, Iowa, and the other at Fort Dodge, Iowa. They were separately owned and operated. The two suits for refunds were therefore independent, but they were consolidated for trial and also for hearing here.

[2]The ballroom operators had made no deductions from the amounts paid for the services of the orchestras, for employees' shares of taxes, under 26 U.S.C.A. Int. Rev. Code, § 1401, and so had been obliged to pay these portions also out of their own funds to the Collector.

gagements,[3] for some public dances held at the ballrooms during 1941 and 1942. The leaders of the orchestras which had played at one of the ballrooms intervened in that suit to oppose recovery and have also taken an appeal.

The question is whether such a relationship was involved in the engagements as entitled the Commissioner of Internal Revenue to treat the leaders and members of the orchestras as employees of the ballroom operators for social-security-tax purposes. The ballroom operators contended that the relationship between them and the leaders and members of the orchestras had not been that of employer and employee, but that each of the leaders was an independent contractor and that the members of the orchestras were employees of the leaders in the engagements. The District Court adopted this view, 59 F. Supp. 84, and held[4] that the tax authorities had accordingly erred in requiring the ballroom operators to pay social security taxes on the leaders and their orchestra-members.

The engagement in each instance was entered into by a standard-form contract,[5] referred to as "Form B", which the American Federation of Musicians[6] had prepared in 1941 and thereafter required all its members to use. The contract designated the ballroom operator as "employer" and the leader and his orchestra-members as "employees". It contained a recitation that "the employer employs the personal services of the employees, as musicians severally", and a provision that "the employees severally, through

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[3] In the case of one ballroom, the engagements had all been for single nights. In the case of the other, there had been a number of engagements for two or three successive nights. There had also been repeat engagements by some of the orchestras during the period involved.

[4] The case was tried to the court without a jury.

[5] Generally the engagements of the orchestras were made through booking agencies, with the booking agency executing the contract as representative of the leader and members. Some times the leader also signed the contract. Each contract, of course, was executed by the ballroom operator.

[6] The A. F. of M. is a national labor union, of which both the leaders and their musicians were members.

their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of [the regular leader, by whose name the orchestra was known]", in accordance with the terms and conditions of the contract. The place, the date, and the hours of the engagement were specified, together with the price to be paid, which was set out as a lump sum, with the option in some instances to take a fixed percentage of the gross receipts of the dance.

The contract further provided: "The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract."

The Regulations defining employer-employee relationship for social-security-tax purposes, Treasury Regulations 106, § 402.204, Treasury Regulations 107, § 403.204, promulgated under the authority of 26 U.S.C.A. Int. Rev. Code, §§ 1429, 1609, provide: "Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the

work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees. Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case. If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor. * * *"

The Regulations have merely reiterated definitions and tests of the common law for determining master-and-servant and independent-contractor relationships in vicarious tort-liability. Cf. *Singer Manufacturing Co.* v. *Rahn*, 132

U.S. 518, 523, 10 S.Ct. 175, 33 L.Ed. 440; *Casement* v. *Brown*, 148 U.S. 615, 622, 13 S.Ct. 672, 37 L.Ed. 582; Restatement, Agency, § 220.[7]

It will be noted that the "Form B" contract expressly purported to establish the common-law relation of employer and employee between the ballroom operator and the leader and each of his orchestra-members by providing, after designating the ballroom operator as "employer" and the leader and his orchestra-members as "employees", that "The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract." That the purpose of the American Federation of Musicians in adopting the contract form was to shift as nearly as possible the social-security-tax burden previously borne by a leader on his orchestra-members to those engaging the services of the orchestra, and also to bring the leader himself under the benefits of the Social Security Act, is conceded.

Previously, an orchestra assembled and directed by a leader and performing transient engagements for estab-

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[7] Some Circuit Courts of Appeals have declared that the conventional application of these principles governs the liability for social security taxes. *See Radio City Music Hall Corp.* v. *United States*, 2 Cir., 135 F.2d 715, 717; *Texas Co.* v. *Higgins*, 2 Cir., 118 F.2d 636, 638, 639; *McGowan* v. *Lazeroff*, 2 Cir., 148 F.2d 512, 513; *American Oil Co.* v. *Fly*, 5 Cir., 135 F.2d 491, 492, 493; *Glenn* v. *Standard Oil Co.*, 6 Cir., 148 F.2d 51, 53; *United States* v. *Mutual Trucking Co.*, 6 Cir., 141 F.2d 655, 659; *Glenn* v. *Beard*, 6 Cir., 141 F.2d 376, 377; *Spillson* v. *Smith*, 7 Cir., 147 F.2d 727, 728; *Williams* v. *United States*, 7 Cir., 126 F.2d 129, 132; *Indian Refining Co.* v. *Dallman*, 7 Cir., 119 F.2d 417, affirming D.C., 31 F.Supp. 455; *Anglim* v. *Empire Star Mines Co.*, 9 Cir., 129 F.2d 914, 917; *Jones* v. *Goodson*, 10 Cir., 121 F.2d 176, 180. The Supreme Court, however, has made it clear that in social legislation the employer-employee relation is not necessarily a blueprint of common law concepts, but that under any such statute the area between unequivocal employment and unmistakable entrepreneurial enterprise is entitled to be surveyed and platted in practical industrial and economic perspective and with regard for its special remedial purpose. See *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 126, 127, 64 S.Ct. 851, 857, 88 L.Ed. 1170. Cf. also *United States* v. *Vogue, Inc.*, 4 Cir., 145 F.2d 609, 612, 613; *Grace* v. *Magruder*, App. D.C., 148 F.2d 679, 680, 681; *United States* v. *Aberdeen Aerie No. 24 of Fraternal Order of Eagles*, 9 Cir., 148 F.2d 655, 658. House Report No. 728, 76th Cong., 1st Sess., p. 76, had in similar vein declared that "a restrictive view of the employer-employee relationship should not be taken in the administration of the Federal old age and survivors insurance system in making coverage determinations."

lishment owners, such as hotels, clubs, ballrooms, etc., for which the leader or his booking agent entered into the contracts, had been regarded as an entrepreneurial enterprise of the leader. Thus, in *Williams* v. *United States*, 7 Cir., 126 F.2d 129, certiorari denied 317 U.S. 655, 63 S.Ct. 52, 87 L.Ed. 527, such a leader had been held to be an independent contractor and to be liable for the payment of social security taxes on his orchestra-members. *Spillson* v. *Smith*, 7 Cir., 147 F.2d 727, had repeated this view. There had been holdings also by state courts, under state unemployment-insurance statutes, that leaders of orchestras, who directed, hired and fired, and were liable to the individual musicians for their services, were the employers of the orchestra-members, as opposed to the owners of the establishments with whom the engagements were had, even where the engagements had been for extensive periods, the performances had constituted a part of the regular business of the establishment-owner, and the establishment-owner had exercised some measure of control over the execution of the performances. See e.g. *People* v. *Grier*, 53 Cal. App. 2d Supp. 841, 128 P.2d 207; and cf. also *Hill Hotel Co.* v. *Kinney*, 138 Neb. 760, 295 N.W. 397; *Seattle Aerie No. 1 of Fraternal Order of Eagles* v. *Commissioner of Unemployment Compensation*, Wash., 160 P.2d 614.

After the "Form B" contract came into use, however, the Commissioner of Internal Revenue had ruled that an establishment-owner engaging the services of an orchestra under such a contract and receiving performance thereunder was liable as an employer for the payment of social security taxes on the leader and the members of the orchestra, because the contract, as a matter of specific legal obligation, gave him "complete control" of the services of both the leader and the orchestra-members in the performance of the engagement, even though he might not choose to exercise it. See A & C::IT-Mimeograph Coll. No. 5638, R. A. No. 1339, dated February 21, 1944.

The crux of the common-law distinction between an employer-employee relationship and an independent-contractor status is in the right of the person for whom the services are performed to control the person performing them, "not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished" (Treasury Regulations, supra), or in other words "not only to direct what shall be done, but how it shall be done" (*New Orleans, M. & C. R. Co.* v. *Hanning*, 15 Wall. 649, 657, 82 U.S. 649, 657, 21 L.Ed. 220).[8] It is not necessary that the employer actually shall direct the manner in which the services are performed, but "it is sufficient if he has the right to do so" (Treasury Regulations, supra). Cf. *Grace* v. *Magruder*, App. D.C., 148 F.2d 679, 681.

A contract therefore which obligationally gives complete control of the services which one person agrees to perform for another to the person for whom the work is to be done —such as does the contract here—establishes on its face the legal relationship of employer and employee as it existed at common law. The relationship is capable of being changed, of course, by an abrogation of the provision for control, through either an express agreement of the parties or an implied agreement from circumstances

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[8] "A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." Restatement, Agency, § 220(1).

"While it is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists,—namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of control of the servant's conduct,—the really essential element of the relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done." 35 Am. Jur., Master and Servant, § 3, p. 445.

"Perhaps one of the most frequently quoted [definitions of independent contractor] is to the effect that an independent contractor is one who, in exercising an independent employment, contracts to do certain work according to his own methods, and without being subject to the control of his employer, except as to the product or result of his work." 27 Am. Jur., Independent Contractors, § 2, p. 481.

demonstrative of a mutual abandonment of it—like any other voluntary modification or rescission, Restatement, Contracts, § 406, Comment b. But obligational provisions in a contract cannot be held to have been so abrogated on equivocal showings. Clear and convincing proof has always been required as a basis for granting a judicial rescission, *United States* v. *Maxwell Land Grant Co.*, 121 U.S. 325, 381, 7 S.Ct. 1015, 30 L.Ed. 949, and the rule is the same as to recognizing an alleged abrogation by the parties themselves, *Peck* v. *Stafford Flour Mills Co.*, 8 Cir., 289 F. 43, 45. Thus, in the latter case, where the action was one for damages in breach and the principal defense was that the contract had been mutually abandoned, this Court said that, while a written contract could be changed or abandoned by parol, the evidence to show such a change or abandonment "must be clear and convincing as to the oral agreement." See also Restatement, Contracts, § 511.

The ballroom operators point out that the action here is by a stranger to the contract and that the limitations of the parol evidence rule therefore do not apply.[9] That, of course, is true, but it does not assist in solving the real question in the situation. Exemption from the parol evidence rule simply gave the ballroom operators the right to contradict the terms or obligations of the written contract. It left them free to prove by parol, if the facts so were, that instead of the agreement having been that the legal right of control of the leader's and orchestra-members' services should be given to the ballroom operators, the agreement actually was that it should remain in the leader, or that the parties had never in fact undertaken to agree as to who should have the legal right of control.

[9] Though the point is of no importance here, Williston's critical observation may be noted in passing, that the cases in which the stranger-to-the-contract exemption from the parol evidence rule has been applied have involved mostly contradictions of recited facts or proof of fraud against the rights of third persons, rather than contradictions of express obligations of the instrument. 3 Williston on Contracts, Rev. Ed. § 647, p. 1869. See also 9 Wigmore on Evidence, 3rd Ed., § 2446, p. 149.

The evidence, however, in our opinion, fails to establish either of these situations in relation to the negotiation and execution of the contract. To the contrary it shows that, when the "Form B" contract initially was presented to the ballroom operators in engaging the services of an orchestra, they had objected to the provision giving them the legal right of control and making them employers, until they were told that this was the only basis on which they could obtain the services of the orchestra, and that they thereupon executed the contract and each of the other contracts thereafter and accepted the services of the various orchestras under them. On these facts we think it must be held that the parties in their negotiation and execution of the contract had specifically agreed that the ballroom operators should have the legal right of control over the services of the leader and the orchestra members and so had created the common-law relation of employer and employee between them, at the time the contracts were executed at least. This then would make the question whether the provision for legal right of control could, on proper standards, be said to have been thereafter abrogated so as to have changed the created relationship.

The District Court fell into the error of refusing to recognize the contract as having legally created the relationship of employer and employee at the time of its execution and then undertaking to determine simply whether the evidence showed a subsequent abrogation of that relationship by the parties. It treated the provision for control as if it never had been an obligation of the contract but only a recital or description in the instrument[10] and so

[10]Specific obligations in a contract legally definitive of a created relationship cannot be dealt with on the same level as general recitals or descriptions which the other circumstances of the situation show to be meaningless or of only slight implication. The most common instance of such a recital or description in a contract for services is where it is attempted to term the relationship as other than one of employer and employee, such as by describing the workman as an independent contractor or by a recital that "Nothing contained herein shall be construed to create the relationship of employer and employee." Courts do not hesitate to ignore such recitals or

merely "an element that may be considered by the fact finder [illegible] any assistance in determin[illegible] what is the true relationship." 59 F.Supp. at page 88. It then held that the provision for control was not "of any assistance" as "an element", because "the contract was not entered into by fair negotiations between the parties, but upon demand of the musician's union and the requirement that it must be signed or no orchestra could be obtained", and for the further reason that the provision was in any event meaningless because the control could never be exercised. "If the owner attempted to exercise any such right of taking charge and control of the orchestra it would destroy the orchestra and the result of a satisfactory entertainment. It just could not be done." 59 F. Supp. at pages 88, 89. Finally, the Court said that the whole thing could be ignored also as constituting merely "an anticipatory arrangement to escape taxation."

A court of law cannot ignore a contract because of alleged unfairness in the negotiations by which the obligation has been created, unless the unfairness amounts to duress or fraud capable of avoiding the contract. Duress or fraud has not been set up here, nor has either of them been attempted to be proved. Mere inequality in economic bargaining power is not legal unfairness which will permit either party to avoid a contract or a court to ignore it. The balancing of bargaining power between economic classes is of the legislative and not the judicial domain. The fact that the ballroom operators here had objected to the provision for control, but were obliged to accept it in

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descriptions which are inconsistent with the other equally important general circumstances of the situation. For examples of such cases, see *Matcovich* v. *Anglim*, 9 Cir., 134 F.2d 834; *McDermott* v. *Henricksen*, D. C. Wash., 45 F.Supp. 277; *Industrial Commission* v. *Northwestern Mutual Life Ins. Co.*, 93 Colo. 550, 88 P.2d 560. In the same manner, an artificial designation of an independent contractor as an employee was ignored in *Williams* v. *Smith*, 7 Cir., 126 F.2d 129. These cases, however, do not warrant the similar ignoring of express obligations in a contract in favor of extraneous circumstances.

order to obtain the services of the orchestras, to our mind only serves to emphasize the reality of the making of the agreement.

The view that the provision for control could be ignored as being unexercisable and hence meaningless is also legally untenable. It is equivalent to saying that the leaders and members of organized orchestras are unable legally to become employees of those for whom they perform engagements. Whatever may be the consequence to the reputation of an orchestra in obtaining other engagements or to the quality of the performance to be rendered under an immediate contract, the control of the orchestra's services certainly is capable of being so vested legally in the operator of a hotel, club, ballroom, or other establishment, as to permit of the creation of an employer-employee relationship. It matters not legally whether the hotel manager, club president, or ballroom operator has the capacity, desire, or intention to meddle into the technique of the musical performance. That is not the test or the essence of the creation of the legal right of control for which the contracts here provide. The legal scope of the right in the present situation is unqualifiedly clear—"complete control". The extent to which ballroom operators might deem it practical in their own interest to exercise the right could well vary, but that aspect is not of legal importance, and one instance from the record will serve to illustrate generally that as a matter of fact the right here did have not merely a legal but a practical reality as well. In one of the engagements in suit the orchestra appeared without its regular piano player and the ballroom operator exercised the prerogative of selecting and requiring the leader to use a certain local musician for the performance.

The view that the provision for control could be ignored as an improper scheme or device on the part of the leaders

to escape taxes equally has no validity in the situation. In the first place, the contract does not operate to deprive the Government of any taxes which it otherwise would have received. Next, if the legal relationship of employer and employee was created between the ballroom operators and the orchestra-members, as it was here in the circumstances of the negotiation and execution of the contract, and that relationship had not thereafter been abrogated, the ballroom operators were simply bearing the burden of the taxes which the statute imposes upon any one who occupies an employer's status. That it was the purpose of the orchestra-leaders to rid themselves of taxes by creating an employer-employee relationship with the ballroom operators can hardly constitute a shield to the ballroom operators, if such an employment relationship legally was created and legally continued to exist. Nor are the ballroom operators able to escape the taxes arising out of the engagements because the leaders may be liable for social security taxes on their orchestra-members in their relations outside such engagements.[11] Clearly, a person can be an independent contractor in one part of his activity and an employee in another. Cf. *Cowles* v. *J. C. Mardis Co.*, 192 Ia. 890, 181 N. W. 872. And, even if the general relationship of a leader to his orchestra-members outside the specific engagements was such that the Commissioner of Internal Revenue could have insisted that the leader should pay social security taxes on his orchestra-members all the way down the line and that the brief legal relationships of employer and employee created with the ballroom operators would be ignored for practical purposes of the Treasury in collection or handling or for other reason, this would not help the ballroom operators here. The Government not infrequently has the right to choose between legal and practical

[11] The record indicates that the leaders generally had agreed to pay or guaranteed each orchestra-member a certain amount weekly and that if the sums payable to the members from the specific engagements during such a period did not equal this amount the leaders made good the difference out of their own pockets.

situations in tax matters, *Higgins* v. *Smith*, 308 U.S. 473, 476, 477, 60 S. Ct. 355, 84 L.Ed. 406, but the right to make the choice in such an alternative situation is the Commissioner's, and a taxpayer who has a legal liability for the tax cannot complain of the choice. Courts are concerned only with the legality of what is done in matters of taxation and not with the wisdom or policy of the action.

The ballroom operators have made some arguments why the provision for control was entitled to be ignored, with which the District Court apparently felt it unnecessary to deal in view of the conclusion which it had reached. Principally, they call attention to the fact that the "Form B" contract contained a clause that "It is agreed that all the rules, laws and regulations of the American Federation of Musicians * * * are made part of this contract"; that the by-laws of the Federation in force at the time the "Form B" contract was adopted by its executive board and put into effect by order of its president contained provisions referring to the leaders as employers or contractors and to the orchestra members as employees of the leaders and declaring that "Members of the Federation are only permitted to accept, solicit or negotiate engagements to play in bands or orchestras from members who contract to furnish bands or orchestras, never from the employers or the agents of such to whom the band or orchestra is furnished * * *"; and that these provisions of the by-laws were not formally repealed or changed until some time after the engagements that are here involved. There was, however, another provision in the by-laws giving the president of the Federation the power "to make decisions in cases where, in his opinion, an emergency exists; and to give effect to such decisions he is authorized and empowered to promulgate and issue executive orders, which shall be conclusive and binding upon all members * * *; any such order may by its terms * * * annul and set aside [the Constitution, By-Laws, Standing Resolutions, or other laws,

resolutions or rules of the Federation] or any portion thereof * * * and substitute therefor other and different provisions of his own making; the power so to do is hereby made absolute in the President * * *".

While the order of the president requiring the use of the "Form B" contract in all engagements thereafter made did not in express terms annul or set aside any of these by-laws, there can hardly soundly be any doubt that his edict that "This contract and none other must be used on all such engagements on and after June 1, 1941" and "Any member or any officer who assists a member in preparing a contract on any other form will be in violation of the laws of the American Federation of Musicians and will be subject to charges for said violation" sufficiently required, under the absolute powers vested in him,[12] that the by-laws thereafter, as a union matter, be read in harmony and reconciliation with the relationship attempted to be created by the provision for control in the "Form B" contract.

The provision for control cannot therefore be ignored on the basis of this argument of the ballroom operators. The other minor arguments made why the contract provision could be ignored do not require discussion.

This leaves then as the only remaining question whether the provision for control could be said to have been subsequently abrogated, so as to have changed the employer-employee relationship which had been created at the time the contract was negotiated and executed. The District Court, as we have indicated, erroneously treated the situation as if the provision for control had not created the relationship of employer and employee at the time the contract was executed and that the question therefore simply was one of determining the legal relationship on the basis of the general circumstances and the facts of performance—the

[12] With the question whether the union could be regarded as being democratic in the light of its president's absolute powers, we are, of course, not here concerned.

same as if no obligation covering the right of control had been contained in the contract. It accordingly declared that, since the leader had exercised control over the performance and the ballroom operator had not, this "is sufficient to warrant a finding of the [leader's] right of actual control." 59 F.Supp. at page 89. It regarded as of weight also the leader's part in organizing the orchestra, his efforts generally to create a reputation for the orchestra under his own name, his relation with his musicians outside the contract-engagements, the fact that the ballroom operator was not required to furnish the musical instruments for the performance, and other such extraneous facts, which ordinarily are of assistance in determining whether an employer-employee relationship or an independent contractor status exists, where there is no express contractual obligation covering the right of control.

But these facts, while perhaps ordinarily sufficient to support a finding as to where the right of control resides, when it has not been obligationally fixed by the contract, cannot in our opinion be declared to constitute clear and convincing evidence that there has been an abrogation of the obligation for control and that the relationship of employer and employee created by the negotiation and execution of the contract has been changed. The fact that an employee has been left to perform his tasks without direction, where no conversations or other incidents between the parties are shown to have occurred subsequent to the creation of the employer-employee relationship, is hardly satisfying proof of a mutual change in the contract, for it involves no inconsistency with the continued existence of the employer's right to control if he chooses to exercise it. And such extraneous facts, as that the person agreeing to perform the services normally is engaged in a distinct occupation or business, that the work to be done is a matter of special skill not usually performed under the supervision of the person for whom such services are rendered, that the workman is expected to furnish his own tools and

instrumentalities, and other elements of that nature, which may be of value in throwing light on the intended relationship where the right of control is not contractually clear, can hardly be of much weight, or relevance even, in establishing that there had been a subsequent abrogation of the provision for control in the present case, since these are facts which had existence and were known to the parties at the time the contract was made and to which they manifestly chose to give no significance in obligationally fixing the power of control to create an employer-employee relationship for the particular engagements.

In summary, the relationship of employer and employee legally was created between the ballroom operators and the leaders and orchestra-members by the negotiation and execution of the obligation which gave the ballroom operators the right of complete control over the services, and it has not been shown by clear and convincing evidence that the right of control mutually was abrogated so as to have changed the employment relationship.

The judgments are accordingly reversed and the causes remanded.

GARDNER, Circuit Judge, dissenting.

I think the judgments should be affirmed. The basic facts are not in dispute. The actions were tried to the court without a jury and the trial court on consideration of the evidence entered findings as follows:

"I. That at all times, and during the times of the performance by the several orchestras on the premises of the plaintiffs, the leaders of the orchestras exercised entire direction and control, and the right of control, over their orchestras and the members thereof, and the method and manner of doing the work. Such leader exercised and had the exclusive right to hire and fire such members, to con-

tract for and pay their wages, and to keep all profits and sustain and pay such losses as occurred from the performances. Such leader organized, managed and controlled such orchestras as an independent organization for hire, and the true relationship as shown by the evidence was that such leaders were independent contractors and the members of the orchestras their employees within the meaning of the Internal Revenue Statutes.

"2. The contract, Form B, was not entered into by fair negotiation between the parties, but upon demand of the musician's union and the leaders of the orchestras that it must be entered into or no orchestra could be obtained, and it was required to be so executed with the avowed purpose of protecting the leader from taxes as an employer. It was required by the leader to be entered into as an anticipatory arrangement to escape taxation. There was no difference in the conduct and control the orchestras, or the right to so conduct and control such orchestras, subsequent to June, 1941, or by reason of the Form B contract, than there was before that time, and the true relationship at all times as between the plaintiffs and such leaders was that the latter were independent contractors.

"3. At the time of the execution of the contracts, Form B, neither the orchestra leader nor any of the sidemen intended thereby to transfer or give to the ballroom operators control of or the right to control the orchestra or the sidemen, or the method or manner of doing its or their work in any particular. And at the time of the execution of the contracts, Form B, the ballroom operators never intended thereby to have transferred to them or to receive or exercise the control of or the right to control the orchestras or any of the sidemen or the method or manner of doing its or their work in any particular.

"4. Considering all the facts and circumstances as disclosed by the evidence, including the contract Form B and its execution, none of the plaintiffs was at the time of the performance of the several orchestras on their premises the employer of the leader or of any of the members of the orchestras within the meaning of the Internal Revenue Statutes."

See *Bartels* v. *Birmingham*, 59 F. Supp. 84.

It was within the province of the trial court to draw such inferences from the basic facts and circumstances as were reasonably deducible. In effect the court found that the contract did not represent the true relationship of the parties; that it was not entered into by fair negotiations; that the right to control as well as the actual control was intended to be retained and was retained by the leaders and that the orchestras as independent organizations for hire were inherently incapable of being controlled by the ball-room owners. Judge Donohoe reached substantially the same conclusion in *Nebraska National Hotel Co.* v. *O'Malley*, 63 F.Supp. 26. Having so found, the trial court in the instant case concluded that the leaders were independent contractors and that they rather than the ball-room owners were the employers of the musicians or sidemen. The findings of the court are presumptively correct and are not to be set aside unless clearly erroneous, and due regard must be given to the opportunity of the trial court to judge of the credibility of the witnesses, and hence, the weight to be given their testimony. Rule 52 (a), Rules of Civil Procedure. A finding of fact is clearly erroneous only when it is not supported by substantial evidence, or is arrived at by the application of a wrong principle of law. *Sears, Roebuck & Co. v. Talge*, 8 Cir., 140 F.2d 395. We have held that substantial evidence is such " 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Archer* v. *Securities & Exchange Commission*, 8 Cir., 133 F.2d 795. In determining whether there is substantial evidence to support the findings of the trial court, this court should consider the evidence most favorably to the party prevailing (*United States* v. *Perry*, 8 Cir., 55 F.2d 819), and when different conclusions may reasonably be drawn from the evidence, the question as to which inference should be drawn is for the trial court and not for the appellate court. *Luzier's Inc.* v. *Nee*, 8 Cir., 106 F.2d 130; *Brooks*

v. *Willcuts*, 8 Cir., 78 F.2d 270. Even where the evidence is undisputed, if different conclusions may reasonably be drawn a question of fact is presented. *F. T. Dooley Lbr. Co.* v. *United States*, 8 Cir., 63 F.2d 284. It is conceded by the majority opinion that,

"Previously, an orchestra assembled and directed by a leader and performing transient engagements for establishment-owners, such as hotels, clubs, ballrooms, etc., for which the leader or his booking agent entered into the contracts, had been regarded as an entrepreneurial enterprise of the leader. Thus, in *Williams* v. *United States*, 7 Cir., 126 F.2d 129, certiorari denied 317 U.S. 655, 63 S.Ct. 52, 87 L.Ed. 527, such a leader had been held to be an independent contractor and to be liable for the payment of social security taxes on his orchestra-members."

It is also conceded that there had been holdings by the State Courts that leaders of orchestras who directed, hired and fired, and were liable to the individual musicians for their services, were the employers of the orchestra members. It is therefore clear that the majority opinion is bottomed entirely upon the Form B contract entered into between the orchestra leaders and the ball-room owners. The government, to be sure, was not a party to this contract, and if it did not in fact create or change the relationship of the parties it should not be of controlling effect. The trial court took it into consideration together with all the evidence and circumstances and found that it did not change the relationship of the parties as it had theretofore existed, and that the orchestra leaders were the employers of the musicians, and were independent contractors so far as the ball-room owners were concerned. None of the sidemen or musicians, aside from the leaders, executed any of the contracts, and the contract terms designating or giving appellation to a relationship in form created by them, are not in any sense conclusive. Parties can not by the use of legal terms make impotent the legislative arm of the government. The actual facts, not the names or terminology,

employed, must govern. *Doll* v. *Commissioner*, 8 Cir., 149 F.2d 239; *Spillson* v. *Smith*, 7 Cir., 147 F.2d 727; *Matcovich* v. *Anglim*, 9 Cir., 134 F.2d 834; *Industrial Commissioner* v. *Northwestern Mutual Life Ins. Co.*, Colo., 88 Pac. 2nd, 560; *Jack and Jill, Inc.* v. *Tone*, Conn. 9 Atl. 2d 497; *Bertino* v. *Marion Steam Shovel Co.*, 8 Cir., 64 F.2d 409; *Gulf Refining Co.* v. *Brown*, 4 Cir., 93 F.2d 870; *Sanford* v. *Goodridge*, Ia., 13 N.W. 2d 40; *Gilemli* v. *Netherland Dairy Co.*, N.Y., 171 N.E. 906; *Nestle's Food Co.* v. *Industrial Commission*, Wis., 237 N.W. 117; *In re Morton*, N. Y., 30 N.E.2d 369; *Griffiths* v. *Commissioner*, 308 U.S. 355; *Moline Properties, Inc.* v. *Commissioner*, 319 U.S. 436. This principle or rule is particularly pertinent in tax matters. Taxation is a practical matter dealing with realities and the power of taxation is not to be restricted by mere legal fictions, but substance rather than form controls in applying tax laws. *Ruben* v. *Commissioner*, 8 Cir., 97 F.2d 926; *Helvering* v. *Tetzlaff*, 8 Cir., 141 F.2d 8; *Paschal* v. *Blieden*, 8 Cir., 127 F.2d 398; *Weiss* v. *Stearn*, 265 U.S. 242.

Congress imposed a social security tax upon employers and any contractual devices seeking to shift that tax from the class designated by Congress must at least be subjected to scrutiny to determine whether the law is being circumvented. Thus, words contained in a contract providing that nothing in it should be construed to create the relation of employer and employee, have been held to be only "a slight element in assisting the court in a determination of the term 'employment'." *Industrial Commission* v. *Northwestern Mutual Life Ins. Co.*, Colo., 88 Pac. 2nd 560. In *Willard Sugar Co.* v. *Gentsch*, Ohio, 59 F.Supp. 82, Judge Freed said:

"The written contract in evidence, in which it is specifically recited that the plaintiff shall exercise no control or supervision over Kolb except as to the results of his work;

and the printed contract between Kolb and the plaintiff furnished on the required form to the Public Utilities Commission of Ohio, in which there is an assertion that Kolb is an independent contractor, constitutes some evidence as to the relationship between Kolb and the plaintiff.

"These recitals or written provisions in the contracts, however, are not convincing. It is entirely unimportant what designation or terminology was used in these written instruments to denote the relationship of the parties, when the evidence persuasively shows that the relationship was that of employer and employee and not of contractor and contractee."

The Collector in his brief states,

"We agree with the District Court that actual control was seldom, if ever, exercised by the taxpayer personally and we agree also that by the very nature of the services of professional musicians, who work together as a group, their performances are usually directed by the leader."

It is insisted, however, that the "requisite right of control" could be placed in the ball-room operators if the parties so agree, and in effect make the orchestra leaders foremen of a group to conduct them in the performance of certain services. This view seems to form the basis for the conclusion reached by the majority opinion. It is stated in the opinion that,

"It is not necessary that the employer actually shall direct the manner in which the services are performed, but 'it is sufficient if he has the right to do so' (Treasury Regulations, supra)."

This reasoning overlooks the fact that the court found that the contract not only did not create the relationship of employer and employee, but was not intended so to do; that such relation did not in fact exist and that the so-called contract was a mere subterfuge by which it was sought to shift the burden of tax from that class designated by the Act of

Congress to others not so designated. This in fact was the sole purpose of this formal contract. As said by this court, speaking through Judge Stone, in *Doll* v. *Commissioner of Internal Revenue, supra,*

"We have here a written instrument which is sufficient to create a partnership, both at common law and under Missouri decisions. *Schneider* v. *Schneider,* 347 Mo. 102, 146 S.W. 2d 584; *Stone* v. *Guth,* 232 Mo. App. 217, 102 S.W. 2d 738. The judgment here is at most an adjudication of what was never in doubt. The existence of such a contract is not determinative of this tax issue. There remains the impact of the test of an analysis of 'all the circumstances attendant on its creation and operation'."

It is important to bear in mind that the government is not a party to this contract and the court has found on abundant evidence that it was entered into for the purpose of creating an appearance, not of creating a reality. The mere fact that there may be an abstract legal right of control as between the parties is not material because all the circumstances show that this abstract right was a mere subterfuge or fiction by which to avoid the act of Congress by shifting the tax from those intended by Congress to be subjected thereto. The evidence, including the attending circumstances, abundantly sustained the court in finding that the contract provision was intended to conceal the real relation of the parties as it was recognized by them and found by the trial court. We have in principle condemned such an instrument even as between the parties. Thus, in *Burroughs Adding Machine Co.* v. *Bogdon,* 8 Cir., 9 F.2d 54, it is said:

"The instrument is obviously intended to convey the impression that it is a lease. It is designated 'a machine lease' and the words 'lease,' 'lessor,' 'lessee,' 'rentals,' and 'rent' are frequently employed therein. While the use of these terms has an undoubted weight in determining the character of the instrument, it is not controlling."

Again, in *E. C. Warner Co.* v. *W. B. Foshay Co.*, 8 Cir., 57 F.2d 656, we said:

"So far as the form of the transaction is concerned, no usury is disclosed. Courts, however, are not bound by what the parties represent themselves to be doing, but will look beyond the mere form of the transaction to its substance. Usury is a moral taint, and no subterfuge, however cunningly devised, will be permitted to conceal it. If it appears that the transaction as disclosed by the testimony and the surrounding facts and circumstances was in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, then, regardless of the forms or devices resorted to to conceal the character of the transaction, the parties thereto are subject to the consequences provided by the usury statutes."

Even a deed of warranty will be held to be a mortgage if in fact given to secure an obligation.

The facts and circumstances which seem to me abundantly to sustain the court's finding may be briefly referred to. The leaders of the orchestras were dependent for patronage upon a reputation for playing dance music in a distinctive style. These leaders selected the musicians, the instruments, and the musical arrangements. They trained the musicians and rehearsed the musical selections for the purpose of performing this distinctive style. In playing engagements—usually single evening performances—the leader led and directed the musicians so as to make certain that the production was of the type the public identified as his. The name of the leader was extensively advertised. The ball-room operator relied upon the orchestra leader to bring to his ball-room an organization capable of performing in a satisfactory manner and in the distinctive style recognized as belonging to that organization. The musicians or sidemen were selected and hired by the leader and were discharged by him. The ball-room operators never hired nor discharged any sidemen and they never had any conversation with the leader or sidemen about

discharges. Salaries and wages of the sidemen and length of the terms of their employment were agreed upon by the leader when he made his arrangements with the sidemen and this was all done long before any appearance at the ball-rooms of the appellees. The compensation of the sidemen was usually a flat weekly rate which the leader was bound to pay regardless of whether or not the orchestra played engagements. Some leaders kept a regular payroll, showing the names of the sidemen and the amounts of their compensation. Appellees did not even know the amount of compensation paid the sidemen, nor the manner of payment. Indeed they had nothing whatever to do with determining the amount. Appellees paid a gross contract price for each engagement, which was determined through negotiations between them and the leader or the booking agent. The performance price was paid to the leader or his booking agent, never to the sidemen. Profits, after expenses were paid, belonged to the leader. If a loss resulted, he bore it. In the performance of his engagement each leader dictated such matters as the style of music, its length, tempo and volume. He owned the musical library of sheet music which was used by the orchestra, and designated the various selections to be played therefrom; determined the number of sidemen, prescribed and furnished the form of attire worn by the sidemen, provided the music racks and public address system, provided or arranged for the means of transportation to and from the particular engagement, determined the placing of the musicians on the bandstand or rostrum, conducted rehearsals prior to the engagement, and planned and directed the presentation of any featured numbers.

There is no evidence that appellees ever gave any directions or instructions to the leader or sidemen of any orchestra, or ever offered or assumed the right so to do. There is evidence that a leader might ask what patrons liked and the answer might be to mix them up, not to play all

waltzes. This, however, is a far cry from control. It indicates rather that the bandleader wanted advice as to what a particular group might want played. At most it showed cooperation. There was testimony that the operators told the leaders when to take intermissions. This is certainly unimportant and not inconsistent with the finding that the leaders were independent contractors, especially when considered with the mass of testimony going to show that the actual control and operation of the orchestra were in the leader. The trial court surely might reasonably have concluded that an independent contractor might in many things defer to the judgment of one who engaged him and in whose place he was performing. Even this meager testimony as to actual control was denied and the finding of the trial court should be conclusive on that question. Sidemen were often paid by a check on the leader's account in the bank. Leaders of the orchestras testified that there was no difference or change in their operation after the Form B contract was in effect and prior thereto, in performing in appellees' ball-rooms.

The quality of the music produced by these orchestras depended primarily on the ability of the individual musicians, the instrumentation, the selections played, and the skill of leadership. All these matters rested within the leader. The appellees were not skilled musicians and the testimony is uncontradicted that they never had anything to do with hiring or firing the personnel of the orchestra.

The evidence is clear and convincing that the leaders exercised complete control of the means and manner of performance. They and they alone had the right to hire and fire; they and they alone determined the wages of the sidemen; and they and they alone actually paid the sidemen. The leaders were conducting an enterprise for profit, building up a name and reputation for themselves

and their orchestras. The findings of the trial court that the leaders were in fact the employers is sustained not only by substantial evidence but by convincing proof. In fact, a finding that the contract correctly reflected the relationship of the parties would, I think, find no support in the evidence. No case could more convincingly illustrate an agreement which purported to create a certain relationship while the actual conduct and operation of the parties established another. At most the contract was simply a circumstance to be considered in determining the relationship of the parties. It was not exclusive, and as said by the Circuit Court of Appeals of the Fourth Circuit, in *Gulf Refining Co.* v. *Brown*, 93 F.2d 870,

> "It is only by consideration of all of the facts pertaining to the relationship in any case, including the provisions of the contract, the actual conduct of the parties, and the conditions of the business in which they are engaged, that it can be determined whether the distributor is endowed with that control over his own methods and means of doing the work which is the test of an independent contractor."

What Congress has commanded to be taxed must be taxed. Here the statute taxes employment and nothing else. Both the Commissioner and the taxpayer are subject to the statute and can not by adopting a fiction of the parties shift the burden of tax from those upon whom Congress has placed it.

The majority opinion brushes aside the findings of the trial court and bases its conclusion upon the single fact that there was in form a contract which purported to fix the relationship of the parties. This, I think, is not warranted. The findings of the court being sustained by abundant evidence, the judgments appealed from should be affirmed.

[fol. 713] (Judgment in Causes Nos. 13,124 and 13,127.)

United States Circuit Court of Appeals

Eighth Circuit.

September Term, 1946.

Wednesday, September 25, 1946.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the States of Iowa, Appellant,
No. 13,124. vs.
Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom.

Appeal from the District Court of the United States for the Southern District of Iowa.

and

Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, Interveners, Appellants,
No. 13,127. vs.
Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon d/b/a Crystal Ballroom.

Appeal from the District Court of the United States for the Southern District of Iowa.

These Causes came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in these causes (No. 294 in the District Court), be, and the same is hereby, reversed with costs.

[fol. 714] It is further Ordered by this Court that the Interveners, Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, have and recover against Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, the sum of Seven Hundred Seventeen and 29/100 ($717.29) Dollars, being the amount of Clerk's general fees incurred by said Interven

ers in this Court $27.20, the amount paid for one-half of Clerk's fees for preparing record for the printer and supervising the printing of the record $83.13, and the amount paid for one-half of the cost of printing the record $606.96, and have execution for said total sum of $717.29.

It is further Ordered by this Court that Roy Bartels, Ed Bartels, Carl Bartels and Justin Conlon, d/b/a Crystal Ballroom, pay to the Clerk of the District Court the sum of Twenty and 87/100 ($20.87) Dollars, being one-half of the Clerk's general fees incurred by E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, in this Court. Said sum of $20.87 to be collected by the Clerk of the District Court according to law and by him paid over to the Clerk of this Court for proper accounting thereof.

And it is further Ordered by this Court that these causes be and the same are hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court filed herein.

September 25, 1946.

[fol. 715] (Judgment in Cause No. 13,125.)

United States Circuit Court of Appeals
Eighth Circuit

September Term, 1946.

Wednesday, September 25, 1946.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,
No. 13,125. vs.
Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms.

Appeal from the District Court of the United States for the Southern District of Iowa.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause (No. 328 in the District Court), be, and the same is hereby, reversed with costs.

It is further Ordered by this Court that E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, have and recover against Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, the sum of Six Hundred Six and 96/100 ($606.96) Dollars, being the amount paid the printer for one-half the cost of printing the record from the District Court, and have execution therefor.

[fol. 716] It is further Ordered by this Court that Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, pay to the Clerk of the District Court the sum of One Hundred Four ($104.00) Dollars, being one-half of the Clerk's fee for preparing the record for the printer and supervising the printing thereof incurred by E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa $83.12, and one-half of the Clerk's general fees incurred by E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, in this Court $20.88. Said sum of $104.00 to be collected by the Clerk of the District Court according to law, and by him paid over to the Clerk of this Court for proper accounting thereof.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court filed herein.

September 25, 1946.

[fol. 717] (Motion of Appellees to Stay Issuance of Mandates in Causes Nos. 13,124, 13,125 and 13,127.)

In the United States Circuit Court of Appeals
for the Eighth Circuit.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,
No. 13,124. vs.
Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, Appellees.

E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, Appellant,
No. 13,125. vs.
Larry V. Geer and Margaret Geer, d/b/a Larry Geer Ballrooms, Appellees.

Griff Williams, Bill Carlsen, Tiny Hill, Boyd Raeburn, Buddy Fisher and Paul Moorhead, Intervenors, Appellants,
No. 13,127. vs.
Roy Bartels, Ed Bartels, Carl Bartels, and Justin Conlon, d/b/a Crystal Ballroom, Appellees.

[fol. 718] Comes now the Appellees in the above entitled causes and shows unto the Court as follows:

That on September 25, 1946 an opinion and judgment of this Court was entered in these cases reversing the judgments appealed from and remanding the causes to the District Court of the United States for the Southern District of Iowa.

That it is the purpose of the Appellees to make timely petition to the Supreme Court of the United States for a writ of certiorari to be directed to this Court to the end that the decision and judgment of this Court in these causes may be reversed by the Supreme Court of the United States.

Wherefore, Appellees move the Court to enter an order herein directing the Clerk to withhold the mandate of this Court in these causes for a period of thirty (30) days from October 11, 1946.

THOMAS B. ROBERTS,
CLYDE B. CHARLTON,
Attorneys for Appellees,
4th Floor, Empire Building,
Des Moines, Iowa.

(Endorsed): Filed in U. S. Circuit Court of Appeals on Oct. 7, 1946.

[fol. 719] (Order Staying Issuance of Mandates in Nos. 13,124, 13,125 and 13,127.)

September Term, 1946.

Monday, October 14, 1946.

On Consideration of the motion of appellees for a stay of the mandates in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandates herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

October 14, 1946.

[fol. 720] (Clerk's Certificate.)

United States Circuit Court of Appeals
Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of two volumes, Volume I consisting of pages a to 380, inclusive, and Volume II consisting of pages 381 to 719, inclusive, contains the transcript of the records from the District Court of the United States for the Southern District of Iowa as prepared and printed, pursuant to designation and stipulation, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerks, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein E. H. Birmingham, Individually and as Collector of Internal

Revenue for the State of Iowa, was Appellant and Roy Bartels, et al., were Appellees, No. 13,124, E. H. Birmingham, Individually and as Collector of Internal Revenue for the State of Iowa, was Appellant and Larry V. Geer, et al., were Appellees, No. 13,125, and Griff Williams, et al., were Appellants and Roy Bartels, et al., were Appellees No. 13,127, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 30th day of October, A. D. 1946.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

[fol. 721] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 731

ORDER ALLOWING CERTIORARI—Filed January 6, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 722] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 732

ORDER ALLOWING CERTIORARI—Filed January 6, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.